Supreme Court, U. S.
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No. 80-5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RICHARD JOHN McCARTY, APPELLANT

v.

PATRICIA ANN McCARTY, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

JURISDICTIONAL STATEMENT

MATTANIAH EYTAN
KIRKWOOD, KAPLAN, RUSSIN & VECCHI
332 Pine Street, Suite 400
San Francisco CA 94104
Telephone: (415) 421-1100

Counsel for Appellant

June 30, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

RICHARD JOHN McCARTY, Appellant

v.

PATRICIA ANN McCARTY, Appellee

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

JURISDICTIONAL STATEMENT

Appellant Richard John McCarty appeals from the final judgment of the Court of Appeal of California, First Appellate District, Division Four, following the California Supreme Court's denial of his petition for hearing.

QUESTION PRESENTED

Whether the system of military retirement benefits established by the Congress, preempt the State of California from treating army retirement pay as community property divisible upon divorce.

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OPINIONS BELOW

The Court of Appeal's opinion is unreported. (App. A, infra.) The San Francisco superior court's memorandum of intended decision is also unreported. (App. B, infra.) The California Supreme Court rendered no opinion when it denied Appellant's Petition for hearing. (See App. C, infra.)

JURISDICTION

The California Court of Appeal entered its judgment on February 6, 1980. The Supreme Court of California denied Appellant's petition for hearing on April 3, 1980. A notice of appeal to this Court was duly filed in the California Court of Appeal on June 30, 1980.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's petition for hearing.

Appellant argued below that § 4803 of the California Civil Code, as applied to army retirement pay, was repugnant to federal statutes and invalid under the U.S. Constitution. The California courts upheld the statute's validity.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

10 U.S.C. §§ 672(a)(1) 3929, 3991
11 U.S.C. § 523(a)(5)
42 U.S.C. §§ 659(a), 662(c)
California Civil Code § 4803

These statutes, along with Article VI, clause 2 of the United States Constitution, appear in Appendix E.

STATEMENT OF THE CASE

The parties were married on March 23, 1957. Appellant ("the husband") commenced active duty in the U. S. Army on July 1, 1958. On December 1, 1976, he filed for divorce in the San Francisco superior court. Appellant retired from the army on September 30, 1978, after twenty years of active duty. The parties were divorced by interlocutory judgment entered on September 8, 1977. The superior court entered final judgment of divorce on February 23, 1978.

In the superior court, Appellee ("the wife") claimed that under § 4803 of the California Civil Code, Appellant's army retirement pay was "quasi-community property" divisible upon divorce. The husband argued inter alia[1/] that applying § 4803 to his retirement pay would contravene federal statutes and violate the supremacy clause of the U. S. Constitution.[2/]

1/ The husband also argued before all three California courts that he was an Oregon domiciliary when he commenced active duty; that during his uninterrupted military service he had not lost his Oregon domicile; and that California could not apply its quasi-community property law to a non-California domiciliary. The issue of domicile was resolved against the husband. No appeal is taken from that part of the judgment below.

2/ The husband timely raised these contentions before the trial judge both by memorandum and in oral argument.

There is no transcript of the oral proceedings before the superior court. The court reporter became seriously ill before she could prepare one.

Rejecting this argument, the superior court awarded the wife approximately half of the husband's retirement pay.[3/]

In the Court of Appeal, the husband again maintained that federal statutes, taken together with the supremacy clause of the federal Constitution, preempted California from dividing retirement pay upon divorce.[4/] Citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), he argued that applying

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[3/] The superior court ordered the husband to pay the wife "as long as she lives, that portion of his total monthly pension or retirement payment from the U. S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U. S. Army for the total number of years he has served with the army at the time of retirement". Interlocutory Judgment, para. 6, App. B, Doc. 3.

[4/] The husband raised the federal question in his opening brief, in his reply brief, and in a supplemental brief.

the quasi-community property scheme of California, Civil Code § 4803, to army retirement pay would impermissibly interfere with the military retirement system established by the Congress. Dividing army retirement pay would also, the husband asserted, contravene recent amendments to the Social Security Act, Pub. L. No. 93-647, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659(a)) and Pub. L. No. 95-30, 91 Stat. 159 (1977) (codified at 42 U.S.C. § 662(c)). Although Hisquierdo related to the retirement formula established under the Railroad Retirement Act, 45 U.S.C. § 231 et seq., its reasoning and the authorities on which it relied applied, in Appellant's view, with equal force to military retirement pay.

The Court of Appeal concluded that Congress had not intended to exempt army retirement pay from state community property laws, and that Appellant's retirement pay

was subject to division upon divorce. Citing Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (4th Dist. 1979), the court limited Hisquierdo to railroad retirement benefits.[5/] (App. A, at 57-59.)

The husband petitioned for a hearing in the Supreme Court of California, reiterating his previous arguments and pointing out that the Court of Appeal's decision in the case at bar conflicted with Milhan v.Milhan, 97 Cal. App. 3d 55, 158 Cal. Rptr. 523 (2d Dist. 1979), petition for hearing granted (Cal., Nov. 15, 1978) (L.A. 31191). In Milhan another division of the Court of Appeal had construed Hisquierdo as mandating the same treatment for military retirement pay as for

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[5/] Although Appellant emphasized the central importance of Hisquierdo and the federal preemption issue, the Court of Appeal devoted the bulk of its opinion to procedural issues and the question of domicile. See App. A.

railroad retirement benefits--and as prohibiting California from dividing those benefits upon divorce. Although the California Supreme Court granted a petition for hearing in Milhan, it denied the husband's petition for hearing.[6/]

[6/] The California Supreme Court heard oral arguments in the Milhan case on June 9, 1980.

That court's last word on Hisquierdo's applicability to military retirement benefits appears in a footnote to Henn v. Henn, 26 Cal. 3d 323, 328, 605 P.2d 10, 12, 161 Cal. Rptr. 502, 504, n.3 (decided Jan. 29, 1980). The full text of that footnote reads as follows:

> "The recent decision of the United States Supreme Court in Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 does not compel reconsideration of our holding in Fithian, supra, certiorari denied 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48. In Hisquierdo, the Supreme Court held that federal benefits available under the Railroad Retirement Act of 1974 may not be divided as community property by state courts. However, Hisquierdo was explicitly grounded on 'the totality of the statutory scheme for railroad retirement benefits including its special tax funding, and its unique provisions and legislative history indicating that upon dissolution of marriage the nonemployee spouse should receive no part of the employee spouse's benefits.' (Gorman v. Gorman (1979) 90 Cal. App. 3d 454, 462, 153 Cal. Rptr. 479, 483.)"

THE QUESTION IS SUBSTANTIAL

The question warrants plenary consideration for four reasons:

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF ALASKA AND TEXAS, AS WELL AS WITH DECISIONS OF OTHER STATE COURTS.

Following this Court's decision in Hisquierdo, the Supreme Court of Alaska held that the supremacy clause of the U. S. Constitution prohibits the states from dividing military retirement benefits upon divorce. Cose v. Cose, 592 P.2d 1230, 1232 (Alaska 1979), cert. petition docketed, 48 U.S.L.W. 3627 (U.S. March 19, 1980) (No. 79-1469). Similarly, the Texas Supreme Court held in Ex parte Johnson, 591 S.W. 2d 453 (Texas 1979), that under Hisquierdo, veterans benefits are not subject to division upon divorce.

The highest of courts of other states, however, have read Hisquierdo as allowing the division of military retirement pay pursuant to a divorce:

- Montana: Miller v. Miller, ___ Mont. ___, 609 P.2d 1185 (1980).
- Arizona: Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979).
- California: Henn v. Henn, 26 Cal. 3d 323, 328, 161 Cal. Rptr. 502, 504, 605 P.2d 10, 12 n.3 (1980) (dictum in footnote).

State appellate courts are split on whether Hisquierdo applies to military re-

tirement pay.[7] This clash of authorities perpetuates the uncertainties which existed prior to Hisquierdo--uncertainties created by the state courts' inconsistent decisions on the divisibility of military retirement pay.[8]

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[7] Compare Milhan v. Milhan, 97 Cal. App. 3d 55, 158 Cal. Rptr. 523 (2d Dist. 1979) (Hisquierdo requires that military retirement benefits be treated as serviceman-husband's separate property, not subject to division upon divorce), petition for hearing granted (Cal., Nov. 15, 1979) (No 2 Civ. 55276), and Perez v. Perez, 587 S.W. 2d 671 (Texas 1979) (treating military readjustment benefits as separate property in order to comport with the objectives of Congress), with Musser v. Musser, 70 Ill. App. 3d 706, 388 N.E. 2d 1289 (4th Dist. 1979), and Swope v. Mitchell, 324 So. 2d 461 (La. App., 1975) (dividing military retirement pay).

[8] The highest courts of Colorado and Arkansas refused to permit the division of military retirement pay in divorce actions. Ellis v. Ellis, 191 Colo. 317, 552 P.2d 506 (1976); Fenney v. Fenney, 259 Ark. 858, 537 S.W. 2d 367 (1976). But other state courts reached opposite results prior to Hisquierdo. Fithian v. Fithian, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449 cert. denied, 419 U.S. 825, (1974); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W. 2d 155 (1978), cert. denied, 442 U.S. 940 (1979); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Busby v. Busby, 457 S.W. 2d 551 (Texas 1970); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975). See also Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978) (applying Canal Zone law).

This split among the states is particularly important because of the frequency with which military personnel are transferred. The split encourages forum shopping since the military spouse's retirement benefits are secure in some states but not in others. The states have reached conflicting conclusions on an important question of federal law. There is a strong federal interest in the uniform interpretation of the Acts of Congress dealing with federal military retirement pay.

2. THE QUESTION IS IMPORTANT.

The question whether state law permits the division of military retirement benefits is important. It has never before been treated by this Court. In Hisquierdo, the Court considered policy reasons which might extend to military retirement pay but in its decision dealt only with benefits under the Railroad Retirement Act.

The United States now maintains an all volunteer army. One major inducement for enlistment and reenlistment is army retirement pay. It is no small matter for army recruiters to persuade enlisted men with many years' service to continue in the army, when such servicemen may lose much of their retirement pay in the event of divorce in those states which do not apply Hisquierdo to military retirement benefits.[9/]

[9/] The matter is made worse by federal law restrictions which reduce retirement pay if the military retiree takes on a federal civilian job:

> "5 U.S.C. § 5532(b): A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of Title 10 to reflect changes in the Consumer Price Index."

After subtracting from his already-reduced retirement pay that portion allocated to his ex-spouse under community property systems, the retired serviceman would be left with very little indeed.

Servicemen may well refuse to be transferred to community property states that apportion military retirement pay; by contrast, the army may find that many long term enlistees favor being transferred to Alaska and Texas, where military retirement benefits are protected.

The ex-serviceman's retired pay may represent the largest single asset of the marriage. For this reason the issue may assume paramount importance in many military divorces and unduly influence decisions concerning divorce, continued army life, voluntary transfer from post to post, and divorce settlement negotiations.

The serviceman may alter his decisions to participate in congressionally funded annuity programs to benefit the spouse and children if he believes that military retirement pay is not protected against division in the event of divorce. The Congress

has established several annuity programs, financed by voluntary deductions from the serviceman's pay, by which the serviceman may gain added benefits at the time of his retirement. Among these are the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C.§§ 1447-55. The comprehensive scheme contemplated by the Congress by means of these enactments becomes confused and the serviceman cannot make an intelligent judgment if he is not certain as to how his basic retirement pay will fit in with the annuity program in light of the unsettled status of military retirement pay in the post-Hisquierdo era.

Because of the thousands of divorces that will continue to be affected annually, the issue is of substantial importance and warrants plenary consideration by this Court.

3. THE APPEAL PRESENTS IMPORTANT QUESTIONS CONCERNING THE PREEMPTION BY FEDERAL INTERESTS OF STATE LAW CONCERNS IN THE AREA OF DIVORCE LAW.

The apportionment between spouses of military retirement benefits presents important issues of federal preemption of state divorce laws. Although divorce law is an area almost entirely regulated by the states, the distribution of federal remuneration is an area in which the federal government and the Congress have important concerns. Hisquierdo, 439 U.S. at 582. The established rule is that state law will not be preempted unless Congress has "positively required by direct enactment" that state law be preempted. 439 U.S. at 581. However, in the four instances in which this Court has considered federal preemption of state community property law the Court has in each

case found federal preemption. 10/

The Congress, when it has dealt expressly with community property claims of a divorced spouse, has generally been hostile to those claims. The 1977 clarification to the Social Security Act, Pub. L. No. 95-30, 91 Stat. 159 (1977) (codified as 42 U.S.C. § 662(c)), made it clear that in a divorce proceeding the divorced spouse could not claim as a creditor under community property principles; this provision clarified the meaning and intention of the 1975 amendment,

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10/ See Hisquerdo v.Hisquierdo, supra; Wissner v. Wissner 338 U.S. 655 (1950); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962). See also McCune v. Essig, 199 U.S. 382 (1905).

A literal reading of 10 U.S.C. § 3929 together with § 3991 indicates that the Congress expressly mandated that army retirement pay is to be computed and paid to the servicemen exclusively pursuant to federal law. An examination of the congressional policies behind the literal meaning of these sections may reveal congressional preemption of state community property laws which divert the serviceman's pay to another recipient.

Pub. L. No. 93-647, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659(a)). See Hisquierdo, 439 U.S. at 576-77. Under both the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C. §§ 1447-55, the Congress has excluded the claims of divorced spouses under state community property law.[11/] And in the anti-

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[11/] The serviceman's annuity under the Retired Serviceman's Family Protection Plan can benefit only a surviving spouse. At 10 U.S.C. § 1434(c) the Congress has specified that:

> "An election of an annuity . . . shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce" [emphasis supplied].

In commenting upon this 1968 change in the legislation, the Department of Defense noted that "One purpose of the amendment was to safeguard the participant's future retire pay when . . . a divorce occurs . . ." 1968 U.S. Code Cong. and Adm. News

assignment and anti-anticipation provision relating to army retirement pay, 37 U.S.C. § 701, the Congress has foreclosed any argument that the divorced spouse may claim a por-

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3307. Further, the determination by Congress to exclude ex-wives was done with the most deliberate care. In the passage of the law setting up this plan, provisions which would have protected ex-wives were stricken from the law before its passage. 118 Cong. Rec. S. 29810-12 (1972). In this respect Congress purposely excluded ex-wives from benefiting under the plan. Cose v. Cose, 582 P.2d 1230, 1232 (1979).

Under the Armed Forces Survivor Benefit Plan the term "widow" is so defined in the Act at § 1447 (3) to make clear that the Congress deliberately sought to exclude ex-spouses as a beneficiary entitled to participate in the annuity purchased by a retired member of the armed forces.

tion of retirement pay.[12/]

The Hisquierdo court might well have pointed to the status of a community property spouse under the new Federal Bankruptcy

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12/ § 701(c) states as follows:

"An enlisted member of the Army . . . may not assign his pay, and if he does so, the assignment is void."

(a) of § 701 states as follows:

"Under regulations prescribed by the Secretary of the Army . . . a commissioned officer of the Army . . . may transfer or assign his pay account, when due and payable."

The phrase "when due and payable" in § 701(c) is the exact counterpart of the trust analogy in the Hisquierdo decision whereby the Supreme Court construed the phrase "shall not be anticipated" in § 231 (m) of the Railroad Retirement Act to mean that "the interest of a . . . beneficiary shall not be paid . . . before a certain date." 439 U.S. at 588. The court continued to say "if that definition is applied here, then the offsetting award respondent seeks would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue." 439 U.S. at 589. This analogy to the law of trusts is especially apt with reference to the phrase "when due and payable".

There is in fact little or no difference between paragraph (c) and paragraph (a) of § 701. Cf. United States v. Smith, 393 F.2d 318, 321 (5th Cir. 1968).

Act, 11 U.S.C. § 101 et seq., which entered into force only on October 1, 1979. There can be little doubt that a claim in bankruptcy under § 523(a)(5) of the new Act, "Exceptions to Discharges", by a spouse for community property assets, places the claim in the same category as other claims and makes the claiming spouse an ordinary creditor. The new bankruptcy law does not treat the community property spouse as a co-owner.

These numerous enactments do not manifest a federal policy of recognizing the claims of a non-military ex-spouse to military retirement pay. Rather these statutes suggest precisely the opposite: that military retirement pay is not divisible upon divorce.

4. THE COURT BELOW ERRED BY DIVIDING THE HUSBAND'S RETIREMENT PAY.

The Court of Appeal followed Fithian v. Fithian, 10 Cal. 3d 592, 111 Cal. Rptr. 369,

517 P.2d 449, cert. denied, 419 U.S. 829 (1974), a pre-Hisquierdo decision of the Supreme Court, and found nothing in Hisquierdo to change its mind. Relying upon a post-Hisquierdo decision of the Court of Appeal, Gorman v. Gorman 90 Cal.App. 3d 454, 153 Cal. Rptr. 479 (1979), the court concluded that nothing in the Railroad Retirement Act of 1974 so resembled the federal scheme of military retirement pay as to command the application of Hisquierdo to army retirement benefits.

In addition to the similarity between the anti-assignment provision of the Railroad Retirement Act, 45 U.S.C. § 231(m) and the anti-assignment provision governing military retirement pay, 37 U.S.C. § 701, essential features of military retirement pay parallel those deemed significant for retired railroad workers.

There is nothing unique in the struc-

ture of the railroad retirement system which makes it appropriate to limit Hisquierdo to railroad retirement benefits and not to extend its rationale to military retirement benefits. In neither case is the statutory scheme for retirement contractual; Congress is free to alter or even eliminate the retirement benefits. In both cases the benefits are correlated to the social security system. The 1975 and 1977 amendments to the Social Security Act, codified as 42 U.S.C. §§ 659(a) and 662(c), modify both § 231(m) of the Railroad Retirement Act and the anti-assignment provisions in the military retirement pay scheme, including 37 U.S.C. § 701.

Indeed, whereas the railroad retiree makes some contribution to his retirement program, the military retiree makes none; military retirement pay is funded entirely by mandatory tax receipts, and in that re-

gard the military retirement program is all of a piece with the social welfare plan designed by Congress. It defies logic to perceive in these funding sources a basis for refusing to apply Hisquierdo to military retirement pay.

Further, in a private contractual system for retirement pay, it is understood that retirement pay is, at least in part, payment for past services rather than either a gratuity or payment for ongoing services after retirement. By contrast, military retirement pay contains special features unlike any private retirement scheme.[13/]

13/ A member of the military receiving retirement pay remains subject to being recalled into active service. 10 U.S.C. § 672(a)(1). In this regard military retirement pay represents, at least in part, compensation for remaining in a call up status. Further, a member of the military receiving retirement pay remains subject to the code of military justice. 10 U.S.C. § 802. In this regard as well, the retiree has not broken his relationship with his employer. Further, the military retiree may not take on employment with civilian agency of the United States without substantial financial detriment. See 5 U.S.C. § 5532(b).

Finally, Congress has expressed itself as fully in the military retirement pay area as it has in the Railroad Retirement Act context in rejecting the preservation of benefits for a divorced spouse. See 42 U.S.C. §§ 659(a), 662(c); 10 U.S.C. §§ 1434 (c), 1447(3).

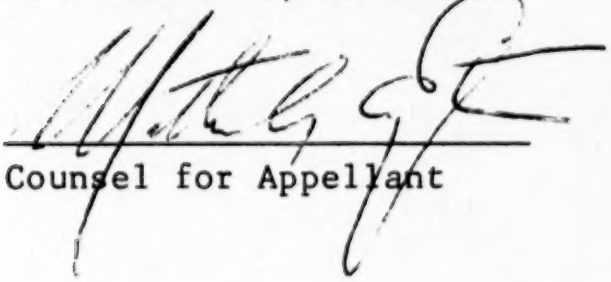
Cases which have applied Hisquierdo to military retirement pay correctly perceive that by its analysis and reasoning Hisquierdo bars the division of military retirement pay pursuant to a divorce. Cose v. Cose, 592 P.2d 123 (Alaska 1979); Ex parte Johnson 591 S.W. 2d 453 (1979); Perez v. Perez, 587 S.W. 2d 671 (Tex. App. 1979).

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

MATTANNIAH EYTAN
KIRKWOOD, KAPLAN, RUSSIN
& VECCHI
332 Pine Street, Suite 400
San Francisco, CA 94104



Counsel for Appellant

June 30, 1980

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403(b) may apply to this appeal.

APPENDIX A

[The Court's discussion of Hisquierdo v. Hisquierdo and the federal preemption issue appears on pages 57 - 59 of this appendix.]

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT,

DIVISION FOUR

In re the Marriage of Richard John and Patricia Ann McCarty.	
RICHARD JOHN McCARTY, Plaintiff and Appellant, v. PATRICIA ANN McCARTY, Defendant and Appellant.	1 Civil 45056 (Super. Ct. No. 715268)

Richard John McCarty (hereinafter "Husband") commenced this proceeding for dissolution of his marriage to Patricia Ann McCarty ("Wife"). He appeals from a portion

of an interlocutory judgment of dissolution in which Wife is awarded part of his monthly military retirement pension. Shortly after he filed notice of his appeal, he obtained from the trial court a final judgment of dissolution which made no exception for the portion of the interlocutory judgment from which he had appealed. Almost one year later, he obtained from the trial court an order amending the final judgment, nunc pro tunc, to except that portion of the interlocutory judgment from it. Wife appeals from that order. The two appeals have been consolidated.

PROCEDURAL SEQUENCE AND FACTS

Husband commenced the proceeding by filing a petition for dissolution of marriage on December 1, 1976. He alleged in the petition that the parties had separated on October 31, 1976, that there were three

minor children of the marriage, and that Husband was "domiciled in Oregon." Husband requested that all listed assets, including "all military retirement benefits," be classified as his separate property.

In her response to the petition, Wife alleged that Husband had "no separate property," and listed his retirement benefits as "subject to disposition by the court."

In answers to interrogatories, Husband stated that he was employed as a military physician at Letterman Army Hospital in San Francisco, that his current residence address was in San Francisco, and that he had resided at that address for two and one-half years. However, his request that the court classify all property acquired during the marriage as his separate property was supported by a declaration in which he alleged that he has always regarded himself as "being domiciled in Oregon."

Husband testified at trial that he had last voted in Oregon in 1968, that he had established and maintained a residence in Oregon in 1956, that he became an Oregon resident for the purposes of his tuition at an Oregon medical school, and that he had never considered himself as domiciled in California. Wife testified that she and Husband came to live in California in 1974, that she considered herself a California resident, and that she and Husband had not lived in Oregon since 1959.

On May 20, 1977, the trial court filed a memorandum decision in which it stated ". . . [Husband] . . . having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to

section 4803 of the Civil Code . . . ."

Findings of fact and conclusions of law were filed on November 23, 1977. In finding no. 11, the court reiterated that Husband failed to sustain his burden of proof as to Oregon residency, while stating in finding no. 13 that ". . . [Wife] . . . was a resident of this State for more than six (6) months and of this County for more than three (3) months immediately preceding the filing of a petition in this action." In finding no. 14, the court found that Husband had "accrued certain pension and retirement benefits by virtue of his service in the United States Army during the marriage . . . . ," that these rights "are subject to the quasi-community property laws of this State," and that Wife "is entitled to and does have a quasi-community interest" in the military retirement funds. The court further determined that the funds would be divided according to a formula based upon

the ratio between the length of Husband's military service during the marriage and the total length of his military service prior to retirement. (See In re Marriage of Anderson (1976) 64 Cal.App.3d 36, 40; In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522-523.)

An interlocutory judgment of dissolution was entered on November 30, 1977, ordering Husband to pay Wife "as long as she lives" that portion of his monthly retirement payment representing one-half of the community interest calculated according to the formula described above. On January 27, 1978, Husband filed a notice of appeal from that portion of the interlocutory judgment "awarding. . . [Wife] . . . a portion of his monthly pension or retirement payment from the United States Army."

On February 23, 1978, Husband filed in the trial court a request that final judgment of dissolution be entered. He alleged

in this request, among other thing, that "no appeal has been taken or is pending. . . [from the interlocutory judgment] . . . , and said judgment has become final." On the same day, the court entered a final judgment of dissolution of marriage ordering "that all of the provisions of the interlocutory judgment. . . be made binding the same as if set forth in full. . . ."

In her reply brief filed in this court on December 19, 1978, Wife contended that Husband had waived his right to appeal by requesting and obtaining a final judgment. This prompted Husband to move the trial court, on January 8, 1979, "to set aside and vacate judgment." Wife opposed the motion. On January 25, 1979, the trial court granted the motion and made an order amending the final judgment so as to except from it that portion of the interlocutory judgment which awards which awards Wife a portion of

Husband's military pension. Wife thereupon appealed from this order. The two appeals were subsequently ordered consolidated by this court for purposes of argument and decision.

REVIEW

Wife's Appeal

Wife continues to contend that Husband's request for a final judgment in this case constituted a waiver of his right to appeal and that this court should dismiss his appeal for that reason. Husband responds (1) that the trial court's order amending the final judgment nunc pro tunc so as not to include disposition of Husband's military retirement benefits cured the "technical deficiency" of which Wife complains; (2) that the trial court in any event had no jurisdiction to enter final judgment as to a matter pending on appeal; (3) that Wife waived her present contention by not moving to dismiss his appeal earlier; and (4) that

his alleged waiver of his right to appeal was not clearly and unmistakably shown. Wife, in turn, (A) challenges the validity of the trial court's order amending the final judgment nunc pro tunc, from which she has appealed; (B) answers Husband's jurisdictional argument by claiming that a party who has himself caused the court to act in excess of its jurisdiction may not thereafter complain of it; and (C) asserts that the issue of nonappealability may be raised at any time.

We need not discuss the merits of each of these points, individually, because of two dispositive conclusions: (1) Husband's act in obtaining the final judgment of dissolution, without specifying an exception for that portion of the interlocutory judgment under appeal, did not of itself constitute a waiver of his appellate rights, and (2) the trial court's order amending the previously entered final judgment of dissolution was valid.

Wife justifiably argues that a judgment entered by consent is not applicable. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 122, p. 4119.) However, Husband is not appealing from the final judgment to which he arguably consented; his appeal is from the portion of the interlocutory judgment which awarded Wife an interest in his retirement benefits. We must therefore decide whether Husband's act in obtaining the initial final judgment, which omitted any reference to his pending appeal from a portion of the interlocutory judgment, constituted a waiver of his right to pursue that appeal. Such waiver is ordinarily implied where a party accepts the benefits of a judgment in whole or in part and then seeks to attack it on appeal. (Turner v. Markham (1907) 152 Cal. 246, 247; 6 Witkin, Procedure, op. cit. supra, Appeal, § 136, p. 4131.) No claim is made that Husband has

sought to accept the portion of the judgment dividing his military retirement payments. Moreover, since Husband did not dismiss or abandon the appeal, his request for an unqualified final judgment created an ambiguity regarding Husband's intent. In the absence of unequivocal acquiescence or voluntary acceptance of benefits, it cannot be said that Husband waived his right to appeal from the designated portion of the interlocutory judgment. (Gudelj v. Gudelj (1953) 41 Cal.2d 202, 214.)

Notwithstanding his action in requesting final judgment, Husband's right to appeal from the interlocutory judgment would still be open to question in view of the subsequent entry of the final judgment, incorporating all provisions of the interlocutory judgment, unless the trial court's order amending the final judgment nunc pro tunc is valid. A court of general jurisdiction has the power, after final judgment

and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the court clerk or counsel, so as to make them reflect or speak the truth. (Benway v. Benway (1945) 69 Cal.App.2d 574, 579-580; 4 Witkin, Procedure, op. cit. supra, Judgment, § 66, p. 3228. See also Code Civ. Proc., § 473.) "Where the judgment as signed does not express the actual judicial intention of the court, but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one." (Zisk v. City of Roseville (1976) 56 Cal.App.3d 41, 47; See Bastajian v. Brown (1941) 19 Cal.2d 209, 214.) The inadvertence or mistake of an attorney draftsman may constitute clerical error. (Russell v. Superior Court (1967) 252 Cal.App.2d 1, 6; 4 Witkin, op. cit. supra, § 69, p. 3231.) The trial court's determination whether an error is clerical

or judicial is entitled to great weight. (Hansen v. Hansen (1949) 93 Cal.App.2d 568, 570.)

Husband's attorney prepared a final judgment, for signature by the trial judge, which did not mention or except that portion of the interlocutory judgment which was then pending on appeal. Because Husband had never indicated any intention to abandon or dismiss his appeal, the trial court could reasonably have concluded the omission was an inadvertent act on the part of counsel. Furthermore, as Husband informed the court in his motion to vacate, the appeal from that portion of the interlocutory judgment dividing pension benefits automatically stayed all proceedings in the trial court on that subject and any attempt by the court to affect it would be void. (Code Civ. Proc., § 916, subd. (a); In re Lukasik (1951) 108 Cal.App.2d 438, 443-444.) The court could therefore have determined that it had not

intended to sign an order which was in direct contravention of statute and in excess of its jurisdiction.[1/]

Wife's arguments that Husband's motion to vacate was untimely under Code of Civil Procedure section 663, and that the trial court could not modify the final judgment because it was "an issue on appeal," are misplaced. Under Code of Civil Procedure section 473, a trial court has inherent power, at any time, to annul judgments inadvertently or improvidently made. (Zisk v. City of Roseville, supra, 56 Cal.App.3d 41 at p. 47; In re Marriage of Mercado (1977) 75 Cal.App.3d 701, 704.) There is substantial

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[1/] On May 24, 1979, the trial judge actually filed a declaration in which he stated that the error was due to inadvertence on the part of his clerk in approving the final judgment for signature, and that he (the judge) would not have signed it in the form prepared if it had been called to his attention that an appeal was pending. Although this declaration has not been included in the record on appeal, it is obviously pertinent to the present discussion. We therefore take judicial notice of it and its contents. (Evid. Code, § 452, subd. (d); id., § 459, subd. (a).)

evidence that the original final judgment was not the result of an exercise of judgment, but that its entry was due to inadvertence. (See In re Marriage of Mercado, supra, at pp. 704-705.) The order amending it nunc pro tunc, for the purpose of conforming it to the court's true intention, was therefore valid and must be affirmed. Husband's appeal is properly before this court.

Husband's Appeal

Husband contends on his appeal that the trial court's failure to make any findings relating to "domicile" is fatal to the judgment because the court had no jurisdiction to treat his military pension as quasi-community property unless it first found that both parties were domiciled in California.

Section 4800 of the Civil Code[2/] provides for an equal division of both community and quasi-community property. Section 4803 defines "quasi-community property" in this way: "As used in this part, 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways: [¶] (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition. [¶] (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

[2/] Statutory references after this point are to the Civil Code except where expressly indicated otherwise.

In Addison v. Addison (1965) 62 Cal.2d 558, the Supreme Court held that section 4803 (then section 140.5) was constitutional but interpreted it to require that husband and wife be "domiciled in California" at the time of dissolution: "The legislation under discussion, unlike old section 164, makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him. . .' (Citation.) Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California. Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for

divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all." (Id., at p. 566 [emphasis added].)

The requirement of domicile was clearly crucial to the holding in Addison, because the court rejected a due process attack on the quasi-community property statute by citing "the [substantial] interest of the state of the current domicile in the matrimonial property of the parties" upon dissolution of the marital relationship. (62 Cal.2d at p. 567 [emphasis added].) Moreover, this court recently held that the Addison court's constitutional sanction of quasi-community property principles was limited to cases meeting "two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouse sought in a California court legal alteration of their marital status." (In re the

Marriage of Roesch (1978) 83 Cal.App.3d 96, 107.)

The trial court did not make a finding as to the domicile of either party, although it did find that Wife was a "resident" of California and of San Francisco for the jurisdictional periods required by section 4530.[3/] The omission did not constitute reversible error for the reasons next captioned and discussed.

(1) Husband is estopped from asserting a foreign domicile. He makes no claim

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3/ Section 4530 provides that a judgment of dissolution may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months. . ." (Emphasis added.) Residence and domicile are not interchangeable in California as Wife suggests. As the Supreme Court noted in Smith v. Smith (1955) 45 Cal.2d 235, residence connotes "any factual place of abode of some permanency," while domicile "is the more comprehensive term, in that it includes both the act or residence and intention to remain." (Id., at p. 239 [original emphasis]. See also § 4531.)

that Wife was domiciled anywhere other than California, and indeed could not do so, because a court has no jurisdiction to grant a dissolution where neither party is domiciled within the state. (6 Witkin, Summary of California Law (8th ed. 1974) Husband and Wife, § 71, p. 4943.) By filing this action for dissolution in a California court while claiming a foreign domicile, Husband impliedly alleged that Wife's domicile was within this state. Under the principle of "divisible divorce," the domicile of one spouse is sufficient to grant a dissolution (Williams v. North Carolina (1945) 325 U.S. 226, 229-230), while support and property rights can only be adjudicated by a court having in personam jurisdiction over both parties. (Estin v. Estin (1948) 334 U.S. 541, 548-549; Hudson v. Hudson (1959) 52 Cal.2d 735, 642-745; 6 Witkin, Summary, op. cit. supra, Husband and Wife, § 77 p. 4949.)

Husband unquestionably invested the California court with such in personam jurisdiction by petitioning that court for dissolution. He went further in that direction by requesting a full disposition of all property and child custody rights arising from the marriage. Having thus invoked the jurisdiction of California over both his marital status and his property rights, he cannot now be heard to contend that a California court is foreclosed from dividing property acquired during the marriage, in accordance with the law of this state, on the ground that his domicile is somewhere else. (See Maloney v. Maloney (1944) 67 Cal.App.2d 278, 280; Mikulski v. Mikulski (1969) 2 Cal.App.3d 1047, 1050; 1 Witkin, Procedure, op. cit. supra, Jurisdiction, §§ 12 [p. 537], 98 [p. 623].) "[T]he plaintiff, by bringing the action, submits himself to the jurisdiction of the court with respect to

his cause of action. Hence, even though he is not present or domiciled in the state, the judgment in his action is binding on him." (1 Witkin, loc. cit., p. 623 [emphasis added].)

Because California is the only state which has in personam jurisdiction over both the parties and their assets, and because Husband's pension benefits were acquired during the marriage, California may make a binding determination of those property rights regardless of where he is domiciled. (See Waite v. Waite (1972) 6 Cal.3d 461, 467-469.) Because he has invoked the jurisdiction of California over his personal property, he is estopped from denying the authority of its courts to adjudicate them in accordance with California law. ". . . California public policy will not permit a litigant 'to blow hot and cold.' He cannot take the benefits of a divorce decree when it

suits his purpose and then reverse his position and repudiate the divorce decree on the ground that it is void for want of jurisdiction (even though it may be) when it is no longer profitable or to his advantage to do so." (In re Marriage of Toth (1974) 38 Cal.App.3d 205, 212.)

(2) A finding that Husband was domiciled in California may be inferred. Husband maintained throughout the dissolution proceeding that he was domiciled in Oregon. Uncontradicted evidence nevertheless established that he left Oregon in 1959; that, after graduating from medical school there, he went on active duty with the United States Army for one year in Pennsylvania, three years in Hawaii, two years in Washington, D.C., four years in California, and five years in Texas; that, after his Texas assignment, he lived in California for two and a half years and resided in this state at the

time he commenced the present proceeding; and that he had not filed any state income tax returns in Oregon within the last preceding five years.

The record does not show that Husband objected to the court's findings, or requested special findings or proposed counterfindings, or brought to the attention of the court any "omission, ambiguity, or conflict" in the findings proposed. (Code Civ. Proc., § 634.) Under such circumstances, this court may infer any findings and conclusions favorable to Wife and in support of the judgment. (In re Marriage of Dawley (1976) 17 Cal.3d 342, 354; Rees v. Department of Real Estate (1977) 76 Cal.App.3d 286, 291.) From the trial court's findings that Husband failed to prove residency in Oregon, that Wife was a resident of California, that Husband's military pension was subject to California's quasi-community

property laws, and that Wife "is entitled to and does have a quasi-community interest in such military pension. . . ," we therefore infer a finding that both parties were domiciled in California at the time the dissolution was filed. (Addison v. Addison, supra, 62 Cal.2d 558 at p. 566.)

It also appears, from the uncontradicted evidence noted above, that any finding regarding domicile would necessarily have been adverse to Husband. Any error in failing to make specific findings as to domicile was accordingly not prejudicial. (McCullough v. Jones (1970) 11 Cal.App.3d 270, 275.)

Finally, the clerk's transcript shows that the findings of fact and conclusions of law were prepared by counsel for Husband.[4/]

[4/] Both the proposed findings and the actual findings display the caption of Husband's attorneys. Moreover, the only objection to any findings was filed by Wife's counsel, stating that ". . . [Wife] . . . objects to the findings of fact and conclusions of law heretofore submitted by petitioner [Husband] . . . ." (Emphasis added.)

An appellant may not complain of inadequate or erroneous findings prepared by his own attorney. (Johnson v. Rich (1957) 150 Cal. App.2d 740, 747; Tucker v. Cave Springs Min. Corp. (1934) 139 Cal.App. 213, 218.)

For all of the foregoing reasons, the failure to make findings regarding domicile did not constitute prejudicial error.

Husband also contends that the federal scheme of military retirement benefits pre-empts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits as the interlocutory judgment orders.

This precise contention was rejected by the California Supreme Court in 1974. (In re Marriage of Fithian (1974) 10 Cal.3d 592, 597-604, cert. den. 419 U.S. 825.) The court found "no evidence that the application of California community property law interferes in any way with the administration or

goals of the federal military retirement pay system," and held that "military retirement pay properly can be characterized as community property in accordance with established principles of California law." (Id., at p. 604.)

More recently, the United States Supreme Court overturned a post-Fithian decision in which the California Supreme Court had held that benefits payable under the federal Railroad Retirement Act could similarly be characterized as community property under California law. (Hisquierdo v. Hisquierdo (1979) _____ U.S. _____ [99 S.Ct. 802].) Husband essentially argues that Hisquierdo overruled Fithian as controlling authority relative to military retirement benefits. This precise contention has also been rejected by a California Court of Appeal. (Gorman v. Gorman (1979) 90 Cal. App.3d 454, 460-462 [hearing den. May 10, 1979].)

After analyzing the contention and the pertinent federal enactments, the Gorman court stated: "We conclude that Hisquierdo does not control the determination as to whether military retirement benefits constitute community property divisible upon dissolution, and pending further consideration of the issue by the California Supreme Court, its decision in Fithian constitutes precedent we are bound to follow." (Gorman v. Gorman, supra, 90 Cal.App.3d 454 at p. 462.) We agree with this conclusion and the reasoning by which the Gorman court reached it. (See id., at pp. 460-462.) Husband's contention to the contrary is accordingly rejected on the authority of Fithian. (In re Marriage of Fithian, supra, 10 Cal.3d 592 at pp. 597-604.)

The order from which Patricia Ann McCarty appeals is affirmed. Neither party shall recover costs on her appeal. The portion of the interlocutory judgment of dissolution from which Richard John McCarty appeals is affirmed. Patricia Ann McCarty shall recover her costs on his appeal.

RATTIGAN, ACTING PRESIDING JUDGE

We concur:

CHRISTIAN, J.

POCHE, J.

1 Civil 45056

APPENDIX B

Document 1: Memorandum of Intended Decision (entered May 20, 1977)

CALIFORNIA SUPREME COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER THIRTEEN

In re the Marriage of Petitioner: RICHARD JOHN McCARTY, and Respondent: PATRICIA ANN McCARTY.	No. 715 268 MEMORANDUM OF INTENDED DECISION

At the time of the trial on April 11, 1977, a decision was announced in open court in all matters excepting a determination of property rights as provided by law and respondent's request for attorney's fees and costs.

The petitioner, having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times

during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to section 4803 of the Civil Code, and respondent's community property interest in any funds received therefrom, will be divided in accordance with the formula set forth in the case of In re Anderson 64 Cal. App. 3d 38. Pursuant to this decision, petitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army to the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a determination at that time and to supervise distribution.

The furniture and furnishings of the parties', pursuant to stipulation in open court, has been divided equally between them.

Respondent shall receive as her sole and separate property the Volkswagen with the value of $2,050, and her mother's obligation to the community in the amount of $2,000.

Petitioner shall receive as his sole and separate property the Van, valued at $5,875, cash in petitioner's possession after payment of obligations outstanding at the time of separation and the net amount of $201 and the life insurance policies with a cash value of $4,756. From this net community equity, petitioner shall pay attorney's fees to Walter T. Winter, attorney for the respondent as a community-type obligation, the sum of $2,000 and an additional $100 toward costs. From these same assets

received by petitioner, he shall also be entitled to payment or reimbursement for $2,000 toward his own attorney's fees and $100 towards his costs.

Respondent shall receive the California life insurance policy and assume all payments thereon, said policy having no cash value.

Pursuant to the foregoing, petitioner would be receiving net assets of a value of $6,632, and respondent net assets of a value of $4,050. To accomplish an equal distirbution, petitioner shall pay to respondent the sum of $1,291 to be payable within thirty (30) days.

The Court reserves jurisdicton over the issue of the responsibility for any 1976 income tax liabilities or refunds.

Respondent, in open court, having requested findings of fact and conclusions of law, petitioner shall also prepare a

judgment in accordance with the decision announced in open court and this Memorandum of Intended Decision.

DATED: May 19, 1977

DONALD B. KING

JUDGE OF THE SUPERIOR COURT

Document 2: Findings of Fact and Conclusions of Law (entered September 8, 1977)

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY

OF SAN FRANCISCO

In Re the Marriage of RICHARD JOHN McCARTY, Petitioner, PATRICIA ANN McCARTY, Respondent.	No. 715 268 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding for dissolution of marriage came on regularly for hearing before the above-entitled Court on April 11, 1977, Petitioner being represented by EDWARD B. COLLINS, his attorney and Respondent being represented by WALTER WINTER, her attorney. Evidence both oral and documentary was introduced, and the cause was submitted

for decision. Being fully advised in the matter, the Court makes the following findings of fact:

FINDINGS OF FACT

1. The parties were married on 23 March 1957 in Portland, Oregon, and have been married ever since.

2. The parties separated 31 October 1976 and the number of years from date of marriage to date of separation is nineteen (19) years, seven (7) months, and eight (8) days.

3. There are four (4) children of this marriage, including the following minor children:

Name	Birth Date	Sex
MARTIN RALPH McCARTY	Dec. 14, 1960	Male
MARLENE ALIKA McCARTY	Dec. 27, 1962	Female
MICHAEL WILDE McCARTY	Sept. 8, 1964	Male

4. Respondent is and has been a resident of this state for at least six (6) months and of the county for three (3) months immediately preceding the filing of the Petition herein.

5. Irreconcilable differences between the parties, which have caused an irremediable breakdown of the marriage, exist.

6. The best interests of the minor children of the parties require that their care, custody, and control be awarded to the Petitioner with reasonable visitation rights to the Respondent.

7. The Respondent is presently attending San Francisco State University part-time, majoring in psychology with a view toward obtaining a Ph.D. in psychology in five (5) or six (6) years.

8. The Respondent is capable of obtaining part-time employment while she is attending San Francisco State University.

9. The Respondent is entitled to utilize the commissary, officers' club, post exchange, and military medical facilities which offer either lower prices than are regularly available to civilian customers or, as in the case of medical care, are free until a final Decree of Dissolution is entered.

10. The Petitioner's net monthly income is $1,536.87. He receives military housing and other standard military benefits which do not include dental care for the children.

11. In addition to his obligation to support and educate the three (3) minor children, the petitioner is responsible for the college expenses of his eighteen (18)-year-old daughter, MAUREEN, and for financial aid to his infirm mother.

12. The Petitioner may receive a variable incentive pay bonus in September of 1977.

13. The Petitioner's fixed monthly expenses, before any allowance for spousal support, are currently in excess of his net monthly income. In order to pay spousal support, the Petitioner's expenses for maintaining himself and his children will have to be contracted--music lessons may cease, a housekeeper will have to be dismissed, etc.

14. In light of Petitioner's obligations and responsibilities, he is able to pay a maximum of $500.00 per month spousal support.

15. The furniture and furnishings of the parties have been divided equally between them by stipulation before the Court.

16. The following is the community property and debts of the parties subject to disposition by the Court in this proceeding:

A. PROPERTY:	VALUE
(1) Chevrolet Van	$ 5,875.00
(2) Cash value of life insurance policies	$ 3,280.00
(3) Cash (after payment of debts at time of separation)	201.00
(4) Volkswagen Car	2,050.00
(5) Debt owed by Margarite Iassac	2,000.00
Total	$13,406.00

B. DEBTS:	
Attorneys' fees and costs:	
(1) Walter Winter, Esq.	$ 2,000.00
For costs	100.00
(2) Edward Collins	2,000.00
For costs	100.00
Total	$ 4,200.00

Petitioner has paid $1,000.00 to Mr. Winter and $1,000.00 to Mr. Collins on account for the above attorneys' fees from the community funds.

17. Petitioner has failed to bear his burden of proof that he was a resident of the State of Oregon at all times during his military service.

18. The parties incurred a 1976 tax liability of $913.00, which was not covered by deductions from the Petitioner's salary.

CONCLUSIONS OF LAW

From the above facts, the Court concludes that:

1. The Petitioner is entitled to a judgment dissolving his marriage.

2. The Petitioner is entitled to the care, custody, and control of the minor children and the Respondent is entitled to reasonable visitation rights.

3. The Respondent is entitled to receive as spousal support the sum of $475.00 per month for her support and maintenance, such payments to have commenced on May 1, 1977 and to continue until a final decree of dissolution of the marriage is entered. Upon entry of a final decree of dissolution, the Respondent will be entitled to receive as spousal support the sum of $500.00 per month for her support and maintenance to commence on the first day of the month after final judgment of dissolution is entered. Furthermore, Respondent is to receive twenty percent (20%) of the gross amount of variable incentive pay bonuses received by Petitioner. Such support is to continue until her death or remarriage or further order of the Court, whichever occurs first.

4. The Respondent is to report to the Petitioner at the beginning of each month any income she receives from employment and

Petitioner is to be entitled to reduce the amount he pays in spousal support by $1.00 for every $3.00 she has earned during the preceding month.

5. The property subject to disposition of this Court shall be awarded as follows:

(a) To the Petitioner: the Chevrolet Van; the cash, after payment of obligations at the date of separation, of $201.00; and the cash value of the life insurance policies of $3,280.00.

(b) To the Respondent: the Volkswagen, and the obligation of Margarite Iassac of $2,000.00.

So that the division of property will be equal, the Petitioner shall first pay attorneys' fees of $1,000.00 to WALTER WINTER, ESQ., and an additional $100.00 for costs, and $1,000.00 to EDWARD B. COLLINS, ESQ., and additional $100.00 for

costs, in addition to the $1,000.00 that he has already paid to both MR. WINTER and MR. COLLINS. The Petitioner should then pay $553.00 to the Respondent.

6. The Court retains jurisdiction to allocate the parties' 1976 income tax liability.

7. The Petitioner, having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to Section 4803 of the Civil Code, and Respondent's community property interest in any funds received therefrom, will be divided in accordance with the formula set forth in the case of In re Anderson, 64 Cal.App.3d 38. Pursuant to this decision, Petitioner shall pay to Respondent, as long as she lives, that

portion of his total monthly pension or retirement payment which equals one-half of the ratio of the total time between marriage and separation during which Petitioner was in the U.S. Army to the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a determination at that time and to supervise distribution.

Let judgment be entered accordingly.

DATED: September 6, 1977

DONALD B. KING
JUDGE OF THE SUPERIOR COURT

Document 3: Interlocutory Judgment (entered November 30, 1977)

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN FRANCISCO

In re the marriage of Petitioner: RICHARD JOHN McCARTY, and Respondent: PATRICIA ANN McCARTY.	Case No. 715 268 INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on April 11, 1977 before the Honorable Donald B. King Department No. 14.

The court acquired jurisdiction of the respondent on December 7, 1976 by:

[X] Service of process on that date, respondent not having appeared within the time permitted by law.

[ ] Service of process on that date and respondent having appeared.

[ ] Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jursidiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court further orders that:

(1) The petitioner is to have custody of the minor children and the respondent is to have reasonable visitation rights.

(2) The petitioner is to pay the respondent the sum of $475 per month for her support and maintenance, such payments to have commenced on May 1, 1977 and to continue until a Final Decree of Dissolution is entered. Upon final entry of a Final Decree of the Dissolution the petitioner is to pay the respondent as spousal support the sum of $500 per month for support and maintenance to commence on the first day of the month

after final judgment of dissolution is entered. Furthermore, the petitioner is to pay respondent 20% of the gross amount of any variable incentive pay bonus he might receive. Such support is to continue until the repsondent's death or remarriage or further order of the Court whichever occurs first.

(3) The respondent is to report to the petitioner at the beginning of each month any increase in income she receives from employment and petitioner is entitled to reduce the amount he pays in spousal support by $1.00 for each $3.00 she has earned during the preceding months.

(4) The property subject to disposition of this Court shall be awarded as follows:

(a) To the petitioner: the Chevrolet Van; the cash, after payment of obligations at the date of separation, of $201.00; and the cash value of the life insurance policies of $3,280.00.

(b) To the respondent: The Volkswagen, and the obligation of Margarite Iassac of $2,000.00.

So that the division of the property will be equal, the petitioner shall first pay attorneys' fees of $1,000.00 to WALTER WINTER, ESQ., and an additional $100.00 for costs, and $1,000.00 to EDWARD B. COLLINS, ESQ., and an additional $100.00 for costs, in addition to the $1,000.00 that he has already paid to both MR. WINTER and MR. COLLINS. The petitioner should then pay $553.00 to the respondent.

(5) The Court retains jurisdiction to allocate the parties' 1976 income tax liability.

(6) The petitioner shall pay the respondent as long as she lives, that portion of his total monthly pension or retirement payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army for the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a termination at that time and to supervise distribution.

Dated: November 21, 1977

JUDGE OF THE SUPERIOR
ROBERT D. CARTER
Approved as to form

Approved as to form:

EDWARD B. COLLINS
Attorney for Petitioner

Approved as to form:

WALTER T. WINTER
Attorney for Respondent

Document 4: Final Judgment (entered February 3, 1978)

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN FRANCISCO

In re the marriage of	)	Case No.
Petitioner: RICHARD JOHN McCARTY,	)	715 268
and	)	FINAL JUDGMENT
Respondent: PATRICIA ANN McCARTY.	)	(MARRIAGE) OF DISSOLUTION

The court acquired jurisdiction of the respondent on December 7, 1976 by:

[X] Service of process on that date, respondent not having appeared within the time permitted by law.

[ ] Service of process on that date and respondent having appeared.

[ ] Respondent on that date having appeared.

The court orders that:

[ ] Pursuant to [ ] Civil Code Section 4506(1) or [ ] Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

/ / Pursuant to / / Civil Code Section 4400, / / Civil Code Section 4401, or / / Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

/X/ Pursuant to /X/ Civil Code Section 4506(1) or / / Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 30, 1977, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated: February 23, 1978

DONALD B. KING
JUDGE OF THE SUPERIOR COURT

APPENDIX C

[The order of the California Supreme Court denying Appellant's petition for a hearing appears in the court's minutes for April 3, 1980. Those minutes are reprinted in the advance sheets of "California Official Reports", 1980, number 12, Minutes, at 1 (April 29, 1980). The minutes will not appear in the bound version, known as "California Reports" 3d.]

MINUTES

SUPREME COURT [OF CALIFORNIA]

Los Angeles, April 3, 1980

• • • • •

(1 Civ. 45056 Div. 4)--In re the Marriage of McCarty, McCarty v. McCarty. Appellant's petition for hearing denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

APPENDIX D

MATTANIAH EYTAN
KIRKWOOD, KAPLAN, RUSSIN & VECCHI
332 Pine Street, Suite 400
San Francisco CA 94104
Telephone: (415) 421-1100

Attorneys for Petitioner
and Appellant

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of RICHARD JOHN McCARTY, Petitioner and Appellant, vs. PATRICIA ANN McCARTY, Respondent.	CIVIL 1/ CIV. 45056

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Richard John McCarty, the petitioner and appellant

named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in this action on February 6, 1980, which affirmed the superior court's judgment dissolving the parties' marriage.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/MATTANIAH EYTAN

Counsel for Richard John McCarty

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 10:

§ 672. Reserve components generally

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However--

> (1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary

of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available. . . .

§ 3929. Computation of retired pay: law applicable

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

§ 3991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

United States Code, Title 11:

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does

not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

United States Code, Title 42:

§ 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia

(including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

§ 662. Definitions

For purposes of section 659 of this title--

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

California Civil Code

§ 4803. Quasi-community property

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant

VS.

PATRICIA ANN McCARTY,
Appellee

On Appeal from the Court of Appeal
of California
First Appellate District, Division Four

JOINT APPENDIX

December 4, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7855

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EDWARD B. COLLINS
COLLINS & HANAVAN
332 Pine St., Suite 400
San Francisco, CA. 94104
(415) 421-1100
Attorney(s) for Petitioner

Superior Court of California

County of San Francisco

Case Number 715-268

In re the marriage of
Petitioner: Richard John McCarty

and

Respondent: Patricia Ann McCarty

[Filed Dec. 1, 1976]

PETITION (MARRIAGE)

1. This petition is for:

Dissolution of the marriage pursuant to:
Civil Code Section 4506(1)

2. Statistical information:

a. Husband's social security number: 489-38-5700. Wife's social security number: 543-44-4081.

b. Date and place of marriage: 23 March 1957, Portland, Oregon.

c. Date of separation: 31 Oct. 1976. The number of years from date of marriage to date of separation is: 19 years, 7 months, 8 days.

d. There are 4 children of this marriage including the following minor children:

Name	Birthdate	Age	Sex
Martin Ralph McCarty	Dec. 14, 1960	15	M
Marlene Alika McCarty	Dec. 27, 1962	13	F
Michael Wilde McCarty	Sept. 8, 1964	12	M

3. Property statement:
Petitioner is domiciled in Oregon

4. Petitioner requests that the following described property be confirmed as petitioner's separate property:

(1) Chevrolet One Ton Van—1975

(2) Funds in checking account in Petitioner's name at Fort Sam Houston National Bank

(3) Funds in savings account at Pentagon Federal Credit Union in Petitioner's name

(4) All military retirement benefits

(5) All household furnishings

(6) Volkswagen—1972

(7) All other property acquired by Petitioner from his earnings.

5. Petitioner requests that:

a. Custody of children be awarded: Petitioner, Richard John McCarty

b. Spousal support be awarded: Respondent, Patricia McCarty

d. Property rights be determined as provided by law

e. Attorney's fees and costs NOT be awarded Respondent

and that the court inquire into the status of the marriage and render such judgments and make such injunctive or other orders as are appropriate.

Petitioner declares under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on November 30, 1976 at San Francisco, California.

/s/ Edward B. Collins
Edward B. Collins
(Attorney for Petitioner)

/s/ Richard John McCarty

2. I have not participated as a party, witness, or in any other capacity. In any other litigation or custody proceeding, in this or any other state, concerning custody of a child subject to this proceeding.

3. I have no information of any custody proceeding pending in a court of this or any other state concerning a child subject to this proceeding, other than that set out in item 2.

4. I do not know of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights with respect to any child subject to this proceeding.

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration is executed on (Date) .....
at (Place) San Francisco, California.

RICHARD JOHN MCCARTY

/s/ RICHARD JOHN MCCARTY

Edward B. Collins
Collins & Hanavan
332 Pine St., Suite 400
San Francisco, CA. 94104
(415) 421-1100
Attorney(s) for Petitioner

Superior Court of California, County of San Francisco

In re the marriage of Petitioner: Richard John McCarty and Respondent: Patricia Ann McCarty	Case Number

DECLARATION UNDER UNIFORM CUSTODY OF MINORS ACT

1. The number of minor children subject to this proceeding is 3. The name, place of birth, birthdate and sex of each child, the present address, periods of residence and places where each child has lived within the past five (5) years, and the name, present address and relationship to the child of each person with whom the child has lived during that time are:

Child's Name:
Michael Wilde McCarty

Place of Birth:
Washington, D.C.

Birthdate:

8 Sept. 1964

Sex:

Male

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of San Francisco, California	Col. & Mrs. Richard McCarty	Mother and Father
		Same. After 10/31/76 resided only with	Father
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Col. & Mrs. Richard McCarty 3120 Zion Lane, El Paso, Tex.	Mother Father

Child's Name:

Marlene Alika McCarty

Place of Birth:

Honolulu, Hawaii

Birthdate:

12/27/62

Sex:

Female

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of San Francisco, California	Col. & Mrs. Richard McCarty	Mother and Father
		Same. After 10/31/76 resided with Father only	
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Col. & Mrs. Richard McCarty 3120 Zion Lane, El Paso, Tex.	Mother Father

Child's Name:

Martin Ralph McCarty

Place of Birth:

Honolulu, Hawaii

Birthdate:

12/14/60

Sex:

Male

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of San Francisco, California	Col. & Mrs. Richard McCarty Same. After 10/31/76 resided with Father only	Mother and Father
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Col. & Mrs. Richard McCarty 3120 Zion Lane, El Paso, Tex.	Mother and Father

Walter T. Winer
100 Bush St., 20th Floor
San Francisco, Ca 94104
433-5580
Attorney(s) for Respondent

Superior Court of California, County of San Francisco

In re the marriage of Petitioner: Richard John McCarty and Respondent: Patricia Ann McCarty	Case Number 715 268

[Filed Dec. 13, 1976]

RESPONSE (MARRIAGE)

1. This response is for:

Dissolution of the marriage pursuant to:

Civil Code Section 4506(1)

Respondent has been a resident of this state for at least six months and of this county for at least three months immediately preceding the filing of this petition.

2. The statistical information in the petition is correct (If incorrect, complete the following)

3. The property statement in the petition is incorrect (if incorrect, com'ete the following)

The following described property is subject to disposition by the court in this proceeding:

1. A 1975 Chevrolet One Ton Van;

2. Funds on Deposit;

3. Military retirement benefits;

4. Household furniture, furnishings and appliances;

5. A 1972 Volkswagen.

6. Other property the full nature and extent of which is unknown to respondent at this time.

7. $2,000.00 owed to the community by Marguerite Isaac.

4. The statement in the petition of separate property to be confirmed by the court in this proceeding is incorrect.*

*Petitioner has no separate property.

Respondent requests that the following described property be confirmed as respondent's separate property:

1. A piano;

2. Miscellaneous items of silver and household furnishings.

5. Respondent requests that:

a. Custody of the children be awarded to Respondent.

b. Support of children be awarded.

c. Spousal support be awarded Respondent.

d. Property rights be determined as provided by law.

e. Attorney's fees and costs be awarded Respondent.

and that the court inquire into the status of the marriage and render such judgments and make such injunctive or other orders as are appropriate.

Respondent declares under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on Dec. 9, 1976 at San Francisco, California.

/s/ WALTER T. WINTER

Walter T. Winter
(Attorney for Respondent)

/s/ PATRICIA ANN MCCARTY

Walter T. Winter
100 Bush St., 20th Floor
San Francisco, Ca 94104
433-5580
Attorney(s) for Respondent

Superior Court of California
County of San Francisco

In re the marriage of Petitioner: Richard John McCarty and Respondent: Patricia Ann McCarty	Case Number 715 268

[Filed Dec. 13, 1978]

DECLARATION UNDER UNIFORM CUSTODY OF MINORS ACT

1. The number of minor children to this proceeding is 3. The name, place of birth, birthdate and sex of each child, the present address, periods of residence and places where each child has lived within the past five (5) years, and the name, present address and relationship to the child of each person with whom the child has lived during that time are:

Child's name:
Michael Wilde McCarty

Place of Birth:
Washington, D.C.

Birthdate:

Sept. 8, 1964

Sex:

Male

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of S.F.	Richard John McCarty and Patricia Ann McCarty After 10/31/76 only with father	Parents
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Richard John McCarty and Patricia Ann McCarty Same address	Parents

Child's Name:

Marlene Alika McCarty

Place of Birth:

Honolulu, Hawaii

Birthplace:

Dec. 27, 1962

Sex:

Female

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of S.F.	Richard John McCarty and Patricia Ann McCarty After 10/31/76 only with father	Parents
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Richard John McCarty and Patricia Ann McCarty Same address	Parents

Child's Name:

Martin Ralph McCarty

Place of Birth:

Honolulu, Hawaii

Birthdate:

Dec. 14, 1960

Sex:

Male

Period of Residence:	Address:	Person Child Lived With: (Name and Present Address)	Relationship:
July 1976 to present	334 Infantry Terrace Presidio of S.F.	Richard John McCarty and Patricia Ann McCarty After 10/31/76 only with father	Parents
11/71 to 7/74	3120 Zion Lane El Paso, Texas	Richard John McCarty and Patricia Ann McCarty Same address	Parents

2. I have not participated as a party, witness, or in any other capacity in any other litigation or custody proceeding. In this or any other state, concerning custody of a child subject to this proceeding.

3. I have no information of any custody proceeding in a court of this or any other state concerning a child subject to this proceeding, other than that set out in item 2.

4. I do not know of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights with respect to any child subject to this proceeding.

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration is executed on (Date) Dec. 9, 1976 at (Place) San Francisco, California.

/s/ Patricia Ann McCarty

Walter T. Winter
100 Bush St., 20th Floor
San Francisco, California 94104
433-5580
Attorney(s) for Respondent

Superior Court of California
County of San Francisco

In re the marriage of Petitioner: Richard John McCarty and Respondent: Patricia Ann McCarty	Case Number 715 268

[Filed Dec. 13, 1976]

NOTICE OF MOTION (MARRIAGE)

To Petitioner: Richard John McCarthy and to his attorney of record: Edward B. Collins, Esq.

Notice is given that Respondent: Patricia Ann McCarty will move this court, located at City Hall, Polk & McAllister St., San Francisco on Dec. 23, 1976 at 9:15 a.m., Department No. 10, for certain orders as set forth in the attached Request for Order and Declaration, to which is attached:

Dated Dec. 13, 1976

/s/ Walter T. Winter
Attorney for Respondent
Walter T. Winter

*Indicate nature of orders requested and, if modification, so indicate by inserting "Re Modification."

Form Adopted by Rule 1285.10 at
Judicial Council of California
Effective January 1, 1972
Notice of Motion (Marriage)

Case Number, 715 268

Request for Order and Declaration In Support of

☐ Order to Show Cause ☒ Notice of Motion

Child Custody. I request that custody of the minor children be awarded (specify, including name, birthdate and age of each child): to Respondent

Martin Ralph McCarty, Dec. 14, 1960, age 15 years
Marlene Alika McCarty, Dec. 27, 1962, age 13 years
Michael Wilde McCarty, Sept. 8, 1964, age 12 years

Visitation. I request the following visitation order: Reasonable to petitioner.

Child Support. I request that $600.00 monthly be paid for child support, payable monthly.

Name, birthdate and age of each child	Amount
Martin, Dec. 14, 1960, age 15 years	$200.
Marlene, Dec. 27, 1962, age 13 years	200.
Michael, Sept. 8, 1964, age 12 years	200.

Spousal Support. I request that $1,000.00 monthly be paid for spousal support, payable monthly.

Attorney's Fees. I request that $1,500. on account be paid for attorney's fees, payable forthwith.

Court and Other Litigation Costs. I request that $250. on account be paid for court and other litigation costs, payable forthwith.

Injunctive/Other Order. I request an injunctive or other order as set forth on the reverse.

Form Adopted by Rule 1285.20 of

Judicial Council of California

Effective January 1, 1972

Request for Order and Declaration In Support of
Order to Show Cause/Notice of Motion

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on Dec. 9, 1976 at San Francisco, California.

/s/ PATRICIA ANN MCCARTY
Patricia Ann McCarty

Attach (or insert above) required
supporting information

Edward B. Collins
Collins & Hanavan
332 Pine Street, Suite 400
San Francisco, California, 94104
(415) 421-1100
Attorney(s) for Petitioner

Superior Court of California,
County of San Francisco

In re the marriage of Petitioner: Richard John McCarty and Respondent: Patricia Ann McCarty	Case Number 715-268

[Filed Dec. 1, 1976]

PETITIONER'S FINANCIAL DECLARATION

Dated:

Husband: Rich rd John McCarty

Age: 42, Social Security No.: 489 38 5700

Occupation: Military Physician

Wife: Patricia Ann McCarty

Age: , Social Security No.: 543 44 4081

Occupation: Housewife

Part A: Income and Expense Statement

	Husband	Wife
(a) Gross monthly income from:		
Salary and wages (including commissions, bonuses and overtime) payable	$3,948	$ 0
(b) Itemize deductions from gross income:		
Income taxes (state and federal)	$ 763	$
Social security	75	
Medical or other insurance	61	
Savings plan: Pentagon Federal Credit	60	
Other: (Specify) Support of Mother	151	
Total deductions	$1,110	$
(c) Net monthly income	$2,838*	$

*average includes bonus of $13,000 paid annually by election.

(d) Total monthly expenses: (Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included) Petitioner presently has custody of the 3 minor children and continues to support the adult child in part. Maureen McCarty, 18; Martin R. McCarty, 15; Marlene McCarty, 13; Michael McCarty, 12. Medical expenses include Petitioner's obligation of $200 per month for Respondent's care.

	Husband	Wife
Rent or mortgage payments (residence)	$ 268	$250
Food and household supplies	400	100
Utilities	—	10
Telephone	60	5
Laundry and cleaning	25	
Clothing	175	
Medical	318	
Dental	218	
Insurance (life, health, accident, etc.)	15	
Child care, Maureen McCarty	100	
School	275	
Entertainment	100	

Incidentals	200	75
Auto expenses (insurance, gas, oil, repair)	150	none
Auto payments	152	

Creditor's Name	For	Monthly Payment	Balance
Pentagon Federal Credit			
	for Chevrolet van	$152.53	$6,000 approx.

Total expenses	$2,547	$440

(e) Other debts and obligations:

Creditor's Name/For	Balance
Sears-Roebuck/general purchases	$900

(f) All property of the parties known to me includes the following:

Cash on hand	$ 20
Money in checking accounts	700
Money in savings accounts	
Money in credit union accounts	7,000
Money in any other accounts or deposits	
Retirement or pension fund	not vested
Life insurance cash value	2,712
Value of any stocks & bonds	
Value of real estate	
Value of all other property	12,000 (approx.)
Total property	$22,432

Part B: Property Statement

There is no property subject to disposition by the court in this proceeding as community property.

The following described separate property is subject to confirmation by the court in this proceeding:

Asset/Obligation	Value of Asset	Amount of Obligation
Household furnishings, approximately	$10,000	$
1975 Chevrolet truck	8,300	6,000
Funds in checking account at National Bank of Sam Houston, San Antonio, Texas	700	
Funds at savings account—Pentagon Federal Credit Union	7,000	
Retirement Benefits (not vested)	unknown	
1972 Volkswagon	1,800	

Part C: Attorney's Fees and Cost Statement

I have agreed to pay my attorney $40.00 per hour monthly, plus expenses.

/s/ Edward B. Collins

(Attorney's signature)
Edward B. Collins

/s/ Richard John McCarty

(Party's signature)
Richard John McCarty

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on Nov. 30, 1976 at San Francisco, California.

/s/ Richard J. McCarty

Richard J. McCarty

Edward B. Collins
Collins & Hanavan
332 Pine Street, Suite 400
San Francisco, California 94104
(415) 421-1100
Attorneys for Petitioner

Superior Court of California
County of San Francisco

Case Number 715-268

In re the marriage of
Petitioner: Richard John McCarty

and

Respondent: Patricia Ann McCarty

[Filed May 20, 1977]

PETITIONER'S AMENDED FINANCIAL DECLARATION

Husband: Richard John McCarty

Age: 42 Social Security No.: 489 38 5700

Occupation: Military Physician

Wife: Patricia Ann McCarty

Age: 40 Social Security No.: 543 44 4081

Occupation: Housewife

Part A: Income and Expense Statement

	Husband	Wife
(a) Gross monthly income from:		
Salary and wages (including commissions, bonuses and overtime) payable	$2,596.51	$
Child/spousal support re prior marriage		
Dividends and interest (Insurance dividend $100/yr.)		
Total monthly income	$2,596.51	$
(b) Itemize deductions from gross income:		
Income taxes (state and federal)	$ 546.00	$
Social security	75.00	
Medical or other insurance	62.52	
Savings plan Pentagon Fdl. Credit	59.10	
Other: (Specify)		
Credit Union—Auto loan	153.52	
Support of Mother	151.00	
Charity	12.50	
Total deductions	$1,059.64	$
(c) Net monthly income—*See exhibit "A"	$1,536.87	$

(d) Total monthly expenses: (Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included). Petitioner presently has custody of the 3 minor children and continues to support the adult child in part. Maureen McCarty—18; Martin R. McCarty—15; Marlene McCarty—14; Michael McCarty—12.

	Husband	Wife
Rent or mortgage payments (residence)	$	$
Food and household supplies	400.00	
Utilities	—	
Telephone	60.00	
Laundry and cleaning	25.00	
Clothing	175.00	
Medical un-reimbursed (since 1 Jan.)	60.00	
Dental	218.00	

Insurance (life, health, accident, etc.) ..			15.00	
Payment of child/spousal support re prior marriage				
School—See exhibit "B"			275.00	
Entertainment			100.00	
Incidentals			100.00	
Auto expenses (insurance, gas, oil, repair)			150.00	
Professional Dues & Journals			18.00	
Creditor's Name/For	**Monthly Payment**	**Balance**		
Executive Credit Loan	$25.28	$409.00	25.00	
Other: (Specify)				
Housekeeping			200.00	
Tap Dance and piano lessons			33.00	
Children's allowances			60.00	
Total expenses			$1914.00	$

(e) Other debts and obligations:

Legal Expenses	est.	3000
Creditor's Name/For		**Balance**
Sears Roebuck—general purchases as of 1 Dec. '76		$ 974
Pentagon Fedl. Credit Union as of 1 Nov. '76—loan of Chev. van		5740
College expenses for 18 yr. old daughter not incl. above		3000 per year
Champus—psychotherapy costs—unreimbursed		1200
Income tax		750

(f) All property of the parties known to me includes the following:

Cash on hand	$	100
Money in checking accounts		230
Money in savings accounts		4,561
Retirement or pension fund		not vested
Life insurance cash value		3,200
Value of all other property		12,000 est.
Total property	$	20,091

Part D: Property Statement

There is no property subject to disposition by the court in this proceeding as community property.

The following described separate property is subject to confirmation by the court in this proceeding:

Asset/Obligation (Estimate)	Value of Asset	Amount of Obligation
Household furnishings, approximately	$10,000	$
1975 Chevrolet truck	6,500	5,740
Funds in checking account at National Bank of Sam Houston, San Antonio, Texas	230	
Funds at savings account—Pentagon Federal Credit Union	4,561	
Retirement benefits (not vested)	unknown	
1972 Volkswagon	1,800	
Marguerite Issac debt	2,000	
Life Insurance—cash value	3,200	
Champus		1,262
Sears		974
Income tax		750

Part C: Attorney's Fees and Cost Statement

I have agreed to pay my attorney $40.00 per hour monthly, plus expenses.

/s/ Edward B. Collins

(Attorney's signature)
Edward B. Collins

/s/ Richard John McCarty

(Party's signature)
Richard John McCarty

I declare under penalty of perjury, that the foregoing, including any attachments, is true and correct and that this declaration was executed on April 10, 1977 at San Francisco, California.

/s/ Richard J. McCarty

Richard J. McCarty

Exhibit "A"

Leave and Earning Statement

1. Name
   McCarty Richard J

2. Unit ID Code
   DQ4AAA

3. Pay Grade
   O 6

4. Period Covered
   01-31Mar77

5. Soc. Sec. No.
   489-38-5700

Net Pay Due
1184.00

6 Entitlements

Type	Amount
Basic pay	$2,190.90
Medical pay	350.00
Bas off	55.61
Totals	$2,596.51

7. Allotment Connections

Type		Amount
Ins	01	$ 14.93
Ins	02	44.19
Finin	01	300.00
Finin	02	211.63
SPT-V	01	151.00
CFC	01	12.50
		$ 734.25

8. Other Collections

Type	Amount
SGLI	$ 3.40
Federal tax	545.99
FICA tax	128.16
	$677.55

9. Amt. Brot. Fwd.
.10

10. Total Ent
$2596.51

11. Allotments
$734.25

12. Other Colls
$677.55

13. Net Earn
$1184.81

14. Mid Mo Pmt
None

15. End Mo Pmt
$1184.00

16. Amt. to Be Brot. Fwd.
.81

17. Income This Period
$2540.90

18. Income Year to Date
$7622.70

19. Income Tax Year to Date
$1637.97

20. Exem
2

21. Add Tax Whd
0

22. FICA Wage
$2190.90

23. FICA Wage Year to Date
$6572.70

24. FICA Tax Year to Date
$384.50

25. State Legal Residence
Or 38

28. Beg IV Bal
46.0

29. Lv Earn
22.5

30. Lv Used
14

31. Ind Lv Bal
54.5

37. Remarks
EOM National Bnk Ft Sam Houst CR 3740198 San Antonio, TX 78286, Guaranteed Deposit

Finance Office Information

38. DSSN
5058

39. Control Number
004646

40. SSOC
Mrn

41. OPED
590612

42. PEBD
550613

45. VPS
21

47. PENO
OLI

48.
37.5

Exhibit "B"

Statement of Educational Expenses

Estimate for 1977-1978 School Year

1. Mike— $550-600 (St. Francis)
2. Marlene— $1000 (Mercy High)
3. Martin— $1050 + 300 building fund (St. Ignatius High)
4. Maureen— $3000 (Cal Poly)

Walter T. Winter
100 Bush St., 20th Floor
San Francisco, CA 94104
433-5580
Attorney(s) for Respondent

Superior Court of California,
County of San Francisco

Case Number 715-268

In re the marriage of
Petitioner: Richard John McCarty

and

Respondent: Patricia Ann McCarty

RESPONDENT'S FINANCIAL DECLARATION

Dated April 8, 1977

Husband: Richard John McCarty

Age: 42 Social Security No.: 489-38-5700

Occupation: Physician (military)

Wife: Patricia Ann McCarty

Age: 40 Social Security No.: 543-44-4081

Occupation: None

(d) Total monthly expenses: (Specify which party is the custodial parent and first name and relationship of all members of the household whose expenses are included)

	Husband	Wife
Rent or mortgage payments (residence)	$	$ 250.
Food and household supplies		175.
Utilities		15.
Telephone		10.
Laundry and cleaning		20.
Clothing		75.
Dental		50.
Entertainment with children		80.
School		100.
Entertainment		75.
Incidentals: X-Mas, Birthday gifts, magazines, etc.		75.
Auto expenses (insurance, gas, oil, repair)		75.
Total expenses	$	$1,000

Walter T. Winter
100 Bush St., 20th Floor
San Francisco, CA 94104
433-5580

STATEMENT OF FEES AND COSTS TO DATE

Mrs. Patricia A. McCarty

WALTER T. WINTER time, 16¾ hrs. at $90 per hour	$1,507.50
One Court appearance at $400 per appearance	400.00
Associate lawyer time, 9 hrs. 10 min. at $60 per hour	550.00
Secretarial time, 18 hrs. 35 min. at $15.00 per hour	278.75
	$2,736,25

COSTS:

Filing fee	$ 29.00	
Photocopies	49.40	
Deposition (Wife)	19.50	
Deposition (Husband)	101.20	
	$199.10	199.10
		$2,935.35
Paid on account as per Court Order		1,000.00
Balance due prior to Trial		$1,935.35

DECLARATION OF RICHARD JOHN McCARTY

I, Richard John McCarty, declare:

1. I am a United States Army Medical Officer, with the rank of colonel, and am presently Chief of Cardiology at Letterman Hospital. I am living on the Presidio Military Reservation in housing provided me by the Army.

2. I married Patricia Ann McCarty during my second year of medical school at the University of Oregon. At about that time, I informed the school that I intended to remain in Oregon and I began paying tuition as an Oregon resident the following year. I also registered to vote in Oregon.

3. I went on active duty with the Army during my fourth year of medical school. After graduation, I was assigned to Valley Forge Army Hospital in Pennsylvania to intern for one year. The Army then assigned me to Hawaii for three years, to Washington, D.C., for two years, to California for four years and to Texas for five years.

4. After completing my tour of duty in Texas, I began my present assignment at Letterman Hospital.

5. I have never registered to vote nor voted in any state other than Oregon.

6. I presently own three vehicles of which two are registered in Oregon. The third has California plates, but there is a military non-resident stamp affixed to the plates.

7. I do not consider myself domiciled in California. Since my marriage, I have always regarded myself as being domiciled in Oregon.

8. I presently have eighteen and one half years' credit toward retirement. In the United States Army, it is possible to retire on a pension after credit for twenty years' service.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on April 11, 1977, at San Francisco, California.

RICHARD JOHN McCARTY
Richard John McCarty
Petitioner

Law offices of
Walter T. Winter
100 Bush St., 20th Floor
San Francisco 94104
433-5580
Attorney for Respondent

Superior Court of the State of California

For the City and County of San Francisco

No. 715 268

In re the marriage of
Petitioner: Richard John McCarty

and

Respondent: Patricia Ann McCarty

[Filed Sept. 6, 1977]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND COUNTER FINDINGS

Patricia Ann McCarty, respondent herein, objects to the findings of fact and conclusions of law heretofore submitted by petitioner, Richard John McCarty, and submits counter findings as follows:

1. Reference is made to proposed finding of fact 4., in which it is indicated that only the respondent was a resident of the State at the time of the filing of the petition; the Memorandum of Intended Decision indicated that petitioner had failed to sustain the burden of proving that he

was a resident of the State of Oregon, which leads to the natural conclusion that he must have been a resident of the State of California, and accordingly, the Court should make the following finding:

"Petitioner and respondent were residents of the State of California for at least six months and of the County of San Francisco for at least three months immediately preceding the filing of the petition herein."

2. Reference is made to findings of fact 7, 8, 9, 10, 11, 12, and 13; with reference to the items set forth therein, some are purely evidentiary in nature and some are without any basis or foundation in the evidence; furthermore, they are all slanted favoring the petitioner and very little is said with reference to his abilities.

Civil Code § 4801 was amended to provide that, at the request of either party, the court should make appropriate findings with respect to the circumstances of the parties, and accordingly, it appears that there should be some findings made with respect to the various circumstances, but since this Code section was just enacted at the beginning of this year, there is no authority or measure or direction as to what the circumstances are that should be set forth.

In order to be fair to both parties, it is submitted that the Court should make the following findings:

"7. Petitioner is a physician and is a full Colonel in the United States Army. His present income is a salary of $2,596.00 per month plus tax free housing and utilities, except telephone. He also receives an annual $13,000.00

bonus as an incentive because he could receive more as a physician outside the military. In addition, he receives other benefits, including health care, CHAMPUS insurance, commissary rights and group insurance. Petitioner has indicated that he plans to retire from the military in July, 1978. He is a board certified physician, having received board certification in internal medicine and cardiology.

"Petitioner's stated gross income is $2,596.51 per month from which he claims deductions for the following items:

Income taxes	$546.00
Social Security	75.00
Medical or other insurance	62.50

These are the only regular, necessary deductions. However, he also has deducted from his salary the following sums:

Credit union for savings	$ 59.10
Credit union for auto loan	153.52
Support of his mother	151.00
Charity	12.50

From the foregoing, he claims a net monthly income of $1,536.37.

"Petitioner filed a financial declaration with the Court indicating that he had necessary expenses for him and four (4) children, including an adult child, of $1,914.00."

"8. Respondent is 40 years old and attends San Francisco State University. She is a major in psychology and will need five or six years more schooling before she can obtain employment in this field. She has not worked since 1958 when she helped put her husband through medical school.

"Respondent filed a financial declaration in which she indicated that she had no income at all and that her necessary monthly expenses were $1,000.00."

"9. From the foregoing, the Court concludes that the petitioner has the ability to pay to respondent, and the respondent needs from petitioner, and it would be reasonable to require petitioner to pay respondent the sum of $500.00 per month spousal support."

3. Objection is made to finding of fact 16, inasmuch as it is incomplete and does not set forth the complete division of property. Further, no reference at all has been made to the pension and retirement funds and the fact that the Court retained jurisdiction to make a determination of the division thereof and to supervise distribution, all in accordance with the Intended Decision.

With reference to the retirement fund, it is requested that the Court make the following findings:

"16. Petitioner has accrued certain pension and retirement benefits by virtue of his service in the United States Army during the marriage of the parties hereto; the Court having found that the petitioner is a domiciliary of the State of California, and further having found that Petitioner subjected himself to the jurisdiction of the Courts of the State of California by virtue of filing this action herein, and further, pursuant to Civil Code § 4803, the said military pension and retirement rights are subject to the quasi-community property laws of this State, the Court finds that the respondent is entitled to and does have a community property interest in such military pension and

retirement funds and that the same will be divided in accordance with the formula set forth in the case of *In re Anderson,* 64 Cal.App. 3d, page 38. Pursuant to this decision, petitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half (½) of the ratio of the total time between marriage and separation during which petitioner was in the United States Army to the total number of years he has served with the United States Army at the time of retirement, and the Court retains jurisdiction to make such determination at that time and to supervise distribution thereof."

It is respectfully submitted that the conclusions of law conform to the foregoing findings.

Dated: July 29, 1977

Respectully submitted,
Law Offices of Walter T. Winter
By /s/ BARBARA DORNAN
Barbara Dornan

Edward B. Collins, Esq.
Kirkwood, Kaplan, Russin & Vecchi
332 Pine Street
San Francisco, California 94104
Telephone: (415) 421-1100
Attorneys for Petitioner

In the Superior Court of the State of California
In and For the City and County of San Francisco

No. 715 268

In Re the Marriage of
Richard John McCarty,
Petitioner,
and
Patricia Ann McCarty,
Respondent.

[Filed Nov. 23, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW*

This proceeding for dissolution of marriage came on regularly for hearing before the above-entitled Court on April 11, 1977, Petitioner being represented by EDWARD B. COLLINS, his attorney, and Respondent being represented by WALTER WINTER, her attorney. Evidence both oral and documentary was introduced, and the cause

*Note: The findings of fact and conclusions of law which appear as Appendix B, Document 2 to the Jurisdictional Statement were supplanted by this document.

was submitted for decision. Being fully advised in the matter, the Court makes the following findings of fact:

FINDINGS OF FACT

1. The parties were married on 23 March 1957 in Portland, Oregon, and have been married ever since.

2. The parties separated 31 October 1976 and the number of years from date of marriage to date of separation is nineteen (19) years, seven (7) months, and eight (8) days.

3. There are four (4) children of this marriage, including the following minor children:

Name	Birth Date	Sex
Martin Ralph McCarty	December 14, 1960	Male
Marlene Alika McCarty	December 27, 1962	Female
Michael Wilde McCarty	September 8, 1964	Male

4. Irreconcilable differences between the parties, which have caused an irremediable breakdown of the marriage, exist.

5. The best interests of the minor children of the parties require that their care, custody, and control be awarded to the Petitioner with reasonable visitation rights to the Respondent.

6. Petitioner is a physician and is a full Colonel in the United States Army. His present income is a salary of $2,596.00 per month plus tax free housing and utilties, except telephone. He also receives an annual $13,000.00 bonus as an incentive because he could receive more as a physician outside the military. In addition, he receives other benefits, including health care, CHAMPUS insurance, commissary

rights and group insurance. Petitioner has indicated that he plans to retire from the military in July, 1978. He is a board certified physician, having received board certification in internal medicine and cardiology. Petitioner has the ability to pay respondent and respondent needs $500.00 per month spousal support.

Petitioner's stated gross income is $2,596.51 per month from which he claims deductions for the following items:

Income taxes	$546.00
Social Security	75.00
Medical or other insurance	62.50

These are the only regular, necessary deductions. However, he also has deducted from his salary the following sums:

Credit union for savings	$ 59.10
Credit union for auto loan	153.52
Support of his mother	151.00
Charity	12.50

From the foregoing, he claims a net monthly income of $1,536.37.

Petitioner filed a financial declaration with the Court indicating that he had necessary expenses for him and four (4) children, including an adult child, of $1,914.00.

7. Respondent is 40 years old and attends San Francisco State University. She is a major in psychology and will need five or six years more schooling before she can obtain employment in this field. She has not worked since 1958 when she helped her husband through medical school.

Respondent filed a financial declaration in which she indicated that she had no income at all and that her necessary monthly expenses were $1,000.00.

The respondent is capable of obtaining part-time employment while she is attending San Francisco State University. The Respondent is entitled to utilize the commissary, officers' club, post exchange, and military medical facilities which offer either lower prices than are regularly available to civilian consumers or, as in the case of medical care, are free until a final Decree of Dissolution is entered.

8. In addition to his obligation to support and educate the three (3) minor children, the petitioner provides for the college expenses of his eighteen (18)-year-old daughter, MAUREEN, and for financial aid to his infirm mother.

9. The furniture and furnishings of the parties have been divided equally between them by stipulation before the Court.

10. The following is the community property and debts of the parties subject to disposition by the Court in this proceeding:

A. Property:

(1) Chevrolet Van	$ 5,875.00
(2) Cash value of life insurance policies	3,280.00
(3) Cash (after payment of debts at time of separation	201.00
(4) Volkswagen Car	2,050.00
(5) Debt owed by Margarite Iassac	2,000.00
Total	$13,406.00

B. Debts:

Attorneys' fees and costs:

(1) Walter Winter, Esq.	2,000.00
For costs	$ 100.00
(2) Edward Collins, Esq.	2,000.00
For costs	100.00
Total	$ 4,200.00

Petitioner has paid $1,000.00 to Mr. Winter and $1,000.00 to Mr. Collins on account for the above attorneys' fees from the community funds.

11. Petitioner has failed to bear his burden of proof that he was a resident of the State of Oregon at all times during his military service.

12. The parties incurred a 1976 tax liability of $913.00, which was not covered by deductions from the Petitioner's salary.

13. Respondent was a resident of this State for more than six (6) months and of this County for more than three (3) months immediately preceding the filing of a petition in this action.

14. Petitioner has accrued certain pension and retirement benefits by virtue of his service in the United States Army during the marriage of the parties hereto; and further, pursuant to Civil Code § 4803, the said military pension and retirement rights are subject to the quasi-community property laws of this State, the Court finds that the Respondent is entitled to and does have a quasi-community interest in such military pension and retirement funds and that the same will be divided in accordance with the formula set forth in the case of *In re Anderson,* Cal. App. 3d, page 38, pursuant to this decision, petitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half (½) of the ratio of the total time between marriage and separation during which petitioner was in the United States Army to the total number of years he has served with the United Army at the time of retirement,

and the Court retains jurisdiction to make such determination at that time and to supervise distribution thereof.

CONCLUSIONS OF LAW

From the above facts, the Court concludes that:

1. The Petitioner is entitled to a judgment dissolving his marriage.

2. The Petitioner is entitled to the care, custody, and control of the minor children and the Respondent is entitled to reasonable visitation rights.

3. The Respondent is entitled to receive as spousal support the sum of $475.00 per month for her support and maintenance, such payments to have commenced on May 1, 1977 and to continue until a final decree of dissolution of the marriage is entered. Upon entry of a final decree of dissolution, the Respondent will be entitled to receive as spousal support the sum of $500.00 per month for her support and maintenance to commence on the first day of the month after the final judgment of dissolution is entered. Furthermore, Respondent is to receive twenty percent (20%) of the gross amount of variable incentive pay bonuses received by Petitioner. Such support is to continue until her death or remarriage or further order of the Court, whichever occurs first.

4. The Respondent is to report to the Petitioner at the beginning of each month any income she receives from employment and Petitioner is to be entitled to reduce the amount he pays in spousal support by $1.00 for each $3.00 she has earned during the preceding month.

5. The property subject to disposition of this Court shall be awarded as follows:

(a) To the Petitioner: the Chevrolet Van; the cash, after payment of obligations at the date of separation, of $201.000; and the cash value of the life insurance policies of $3,280.00.

(b) To the Respondent: The Volkswagen, and the obligation of Margarite Isaac of $2,000.00.

So that the division of property will be equal, the Petitioner shall first pay attorneys' fees of $1,000.00 to WALTER WINTER, ESQ., and an additional $100.00 for costs, and $1,000.00 to EDWARD B. COLLINS, ESQ., and additional $100.00 for costs, in addition to the $1,000.00 that he has already paid to both MR. WINTER and MR. COLLINS. The Petitioner should then pay $553.00 to the Respondent.

6. The Court retains jurisdiction to allocate the parties' 1976 income tax liability.

7. The Petitioner, having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times during his miltary service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to Section 4803 of the Civil Code, and Respondent's community property interest in any funds received therefrom, will be divided in accordance with the formula set forth in the case of *In re Anderson,* 64 Cal.App. 3d 38. Pursuant to this decision, Petitioner shall pay to Respondent, as long as she lives, that portion of his total monthly

pension or retirement payment which equals one-half of the ratio of the total time between marriage and separation during which Petitioner was in the U.S. Army to the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a determination at that time and to supervise distribution.

Let judgment be entered accordingly.

Dated: Nov. 21, 1977

/s/ DONALD B. KING
Donald B. King
Judge of the Superior Court

Edward B. Collins
Kirkwood Kaplan Russin & Vecchi
332 Pine Street, Suite 400
San Francisco, California 94104
Telephone: (415) 421-1100
Attorney for Petitioner

Superior Court of the State of California

City and County of San Francisco

No. 715 268

In re the Marriage of
Richard John McCarty,
Petitioner,
and
Patricia Ann McCarty,
Respondent.

[Filed Sept. 21, 1978]

STIPULATION RE PAYMENT OF RETIREMENT BENEFITS

It is hereby stipulated by and between the parties hereto through their respective counsel as follows:

The petitioner, Richard John McCarty, is to pay all sums due the respondent, Patricia Ann McCarty, pursuant to this Court's order of November 30, 1977 providing that "The petitioner shall pay the respondent as long as she lives, that portion of his total monthly pension or retire-

ment payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army for the total number of years he has served with the Army at the time of his retirement, . . ." into a savings account pending the conclusion of the petitioner's appeal and the entry of a final order from which no appeal is either taken or can be taken. Such savings account shall be in the name of counsel for the parties and under their joint control. Upon conclusion of the appellate process, the prevailing party shall be entitled to all the funds deposited in the savings account and the interest thereon.

Dated: September 5, 1978

KIRKWOOD KAPLAN
RUSSIN & VECCHI

/s/ EDWARD B. COLLINS
Edward B. Collins,
attorney for petitioner,
Richard J. McCarty

Dated: September 6, 1978

/s/ WALTER T. WINTER
Walter T. Winter,
attorney for respondent,
Patricia A. McCarty

Edward B. Collins
Kirkwood Kaplan Russin & Vecchi
332 Pine Street, Suite 400
San Francisco, California 94104
Telephone: (415) 421-1100
Attorney for Petitioner

Superior Court of the State of California
City and County of San Francisco

No. 715 268

In re the Marriage of
Richard John McCarty,
Petitioner,
and
Patricia Ann McCarty,
Respondent.

[Filed Sept. 21, 1978]

ORDER RE PAYMENT OF RETIREMENT BENEFITS

The Court, having reviewed the Stipulation re Payment of Retirement Benefits filed with this Court by the parties to the above-entitled action, and being satisfied with its contents, hereby makes the following order:

The petitioner, Richard John McCarty, is to pay all sums due the respondent, Patricia Ann McCarty, pursuant to this Court's order of November 30, 1977 providing that "The petitioner shall pay the respondent as long as she

lives, that portion of his total monthly pension or retirement payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army for the total number of years he has served with the Army at the time of his retirement, . . ." into a savings account pending the conclusion of the petitioner's appeal and the entry of a final order from which no appeal is either taken or can be taken. Such savings account shall be in the name of counsel for the parties and under their joint control. Upon conclusion of the appellate process, the prevailing party shall be entitled to all the funds deposited in the savings account and the interest thereon.

Dated: 9/21/78

DONALD R. KING
Judge of the Superior Court

Approved as to form:

/s/ WALTER T. WINTER
Walter T. Winter, attorney for
respondent, Patricia Ann McCarty

Edward B. Collins
Collins, Hanavan & Theophilos
332 Pine Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 421-1100
Attorney for Petitioner

Superior Court of California
City and County of San Francisco

No. 715 268

In re the Marriage of
Petitioner: Richard John McCarty

and

Respondent: Patricia Ann McCarty

INTERROGATORIES TO PETITIONER (FIRST SET) AND ANSWERS*

TO PETITIONER ABOVE-NAMED AND TO SAID PARTY'S ATTORNEY OF RECORD:

Respondent, Patricia Ann McCarty, requests that petitioner, Richard John McCarty, pursuant to § 2030 of the California Code of Civil Procedure, answer separately and fully, in writing, under oath, the following first set of interrogatories, and that you file and serve a copy of such

*Note: This composite interrogatories and answers was specially prepared for this appendix. The complete separate interrogatories and answers appear at pages 31 through 61 and 71 through 83 of the Record.

Answers upon the respondent within thirty (30) days after service of such interrogatories.

Comes now the Petitioner and answers Respondent's interrogatories as follows:

PERSONAL INFORMATION

Interrogatory No. 1:

State your full name.

Answer to Interrogatory No. 1:

Richard John McCarty.

Interrogatory No. 2:

Have you ever been known by any surname other than the one you are presently using?

Answer to Interrogatory No. 2:

Yes.

Interrogatory No. 3:

If so, state:

(a) The name.

(b) The inclusive dates during which you used such name:

(c) The reason for your use of such name.

Answer to Interrogatory No. 3:

(a) Richard Sloan.

(b) From date of birth 22 March 1934 until age 4-5.

(c) Remarriage of mother.

Interrogatory No. 4:

State your date of birth and your present age.

Answer to Interrogatory No. 4:

March, 1934, age 42.

Interrogatory No. 5:

Set forth your current address.

Answer to Interrogatory No. 5:

334 Infantry Terrace, Presidio of San Francisco, CA 94129.

Interrogatory No. 6:

How long have you resided at said address?

Answer to Interrogatory No. 6:

Two and one-half years.

Interrogatory No. 7:

What is the name of each person relating there with you?

Answer to Interrogatory No. 7:

Martin Ralph McCarty, Marlene Alika McCarty, Michael Wildie McCarty, Loretta M. McCarty.

Interrogatory No. 8:

You have asked for child custody. In the event that the basis for your claim to custody is any act or omission on the part of the other parent, set forth the following:

(a) A description of each act or omission upon which you base your claim;

(b) Date and place of occurrence of each act or omission, as the case may be;

(c) Name and address of all witnesses to such act or omission;

(d) If you were not personally present at such occurrence, how you found out about it;

(e) Whether or not you, your agents or employees have obtained any statements from any witnesses or photographs or voice recordings concerning the act or omission and, if so, the present location of such statements, photographs or voice recordings.

Answer to Interrogatory No. 8:

(a) 1. Respondent's prolonged affair with minor daughter's fiancé.

2. Deviant psychological behavior.

3. Respondent's habitual prevarication.

(b) 1. Specific acts are too numerous to list.

2. Deviant psychological behavior.

3. Too numerous to list.

(c) 1. Maureen McCarty.

2. All Children.

3. All Children.

(d) 1. My daughter informed me of the affair.

2. Doctor Binger at the University of California Medical Center, among others Dr. David Allen, Dr. Taft Moore, etc.

3. Statements by the children for some of the incidents.

EMPLOYMENT

Interrogatory No. 9:

If you are employed (other than self-employed) set forth the following information concerning *each* of your jobs:

(a) Name and address of your employer;

(b) What is your occupation;

(c) Is this a full time job? If not, set forth the weekly time you spend on this job.

(d) Set forth the amount of your gross salary, and whether this is on a weekly, monthly, semi-monthly, hourly, or other basis;

(e) What are your paydays;

(f) Itemize your regular deductions from your salary:

Federal Income Tax	$
State Income Tax	
Social Security (F.I.C.A.)	
Unemployment	
Medical Insurance	
Life insurance	
Union or other dues	
Retirement or pension fund	
United Fund or charity	
Savings Bonds	
Stock Plan	
Other (specify)	
Total regular deductions	$

(g) How many exemptions are you taking for income tax purchases? [sic]

(h) Do you receive or have you received any fringe benefits, such as automobile, expense account, etc., and if so, specify what those benefits are;

(i) In addition to your regular salary as above-specified, do you receive or have you received any additional payment from your employer for overtime, bonus, or other, and if so, please specify what you received;

(j) Do you expect to receive any additional payments for overtime, bonus, or other additional monies over and above your regular salary in the future, and if so, specify what you expect to receive;

(k) Do you expect to receive a raise within the next year, and if so, specify the amount thereof, if you know;

(l) Do you have any stock purchase rights through your employment, and if so, set forth the details thereof;

(m) Have you accumulated any vacation time with your employer, which can be withdrawn in the form of money in lieu of vacation, and if so, how much?

Answer to Interrogatory No. 9:

(a) United States Army, Letterman Army Medical Center, Presidio of San Francisco, California.

(b) Military physician.

(c) Yes.

(d) $2,596.51 per month plus housing.

(e) The last day of the month.

(f) Federal Income Tax—$545.99, State Income Tax—$0, Social Security—$75.00, Medical Insurance—none, life insurance—$62.50, union and other dues—none, retirement none, United Fund—$12.50, Savings Bond—none, stock plan—none, other support—mother, $151.00 per month, Pentagon Federal Credit Union $211.63.

(g) Two.

(h) Medical meeting trips, medical care and commissary privileges.

(i) Annual bonus of $13,000 per year paid in advance on the 24th of September 1976.

(j) Uncertain.

(k) Yes, $128 per month on June 12, 1977.

(l) No.

(m) No.

EDUCATION

Interrogatory No. 10:

Please set forth your educational background listing all degrees and licenses which you have obtained or able to qualify for:

Answer to Interrogatory No. 10:

Bachelor of Science 1956, Medical Doctor 1959, License to Practice Medicine in the State of California in active #G10659.

Interrogatory No. 11:

If your answer to the last question was in the affirmative, set forth the following information concerning such degrees or licenses:

(a) Date the degree was acquired;

(b) Major and minor or specific field of study relating to the degree;

(c) Whether or not you have had any work experience after obtaining said degree;

(d) Inclusive dates of employment relative to that degree;

(e) The compensation or salary you received relative to your employment.

Answer to Interrogatory No. 11:

(a) Bachelor of Science 1956, Medical Doctor 1959.

(b) Medicine.

(c) Yes.

(d) June, 1959 to the present.

(e) See attached tax records.

SELECTED PAGES FROM REPORTER'S TRIAL TRANSCRIPT

The Court: I think the financial declaration would reasonably cover it, any way. It does not—

Mr. Silverman: I'll withdraw it.

Q. Have you been able to save anything in the last three months, Doctor?

A. No.

Q. In fact, have you spent more money than you have taken in; is that correct?

A. That is correct.

The Court: Now, as I would understand it, Mr. Silverman—

The Witness: I do have the $60 a month that goes to Federal Credit Savings.

The Court: His expenses as currently stated, do not include any payments for spousal support within these figures?

Mr. Silverman: That's right.

The Court: All right.

Mr. Silverman: Nothing further, your Honor.

Mr. Winter.

CROSS-EXAMINATION

By Mr. Winter:

Q. Doctor, in addition to this $2,596.51 that you received, you receive other benefits, don't you?

A. Yes, sir.

Q. And they give you a house on base to live on; is that right?

A. That is right.

Q. Would you tell the Court—would you describe that house to the Court, please. [Trial Transcript, p. 19.]

* * *

The Court: I think it is relevant in terms of the future here but in terms of the present state of the record—but I think, based on what I indicated my inclination was going to be, that is, a failure or unwillingness to do anything more as far as spousal support was concerned, other than deal with the present facts and circumstances of the parties with the understanding that there were, at least, three or four different alternatives that might occur with one or the other within the next couple of years. I mean, it is relevant if I were going to do something more than that, but I think, based on my expression to you in chambers, I would simply issue an order based upon current circumstances, with everybody fully understanding that any change of those circumstances that occurs, there would likewise be an ability, if the parties could not, themselves, agree on some different arrangement, the ability of either party, based upon whoever is affected by those changes, to come back into court, at that point, and seek a change in the order, based on the changed circumstances. So, I would speculate, at this point, in terms of what is—or I

won't make an order on spousal support based on some speculation of what his income might or might not be at some point in the future because, I think we ought to make that determination when his income changes. And, I assume, also, because of the time frame we're dealing with, and the fact that he is to get his retirement, he has to stay in at least until June of '78. It's possible, for one reason or another, he may decide to stay in longer than that. So, essentially, what I am going to be dealing with is on a relatively short-term basis in terms of fixing a specific amount, and then, that amount is going to be subject to change, depending upon what the circumstances of each of the parties are. So, I think, in that sense, it is irrelevant what happens beyond that.

Mr. Winter: All I was trying to do was to demonstrate the man's background and his total ability to earn money at the present time, which would include whatever he decides to do. In other words, can quit tomorrow and still be a cardiovascular surgeon which, I guess, isn't bad.

Mr. Silverman: Not a surgeon—

Mr. Winter: All right, cardiologist.

The Court: I assume, Mr. Silverman can stipulate to that, but we're still dealing, essentially, with what he is actually producing. I recognize his capacity might be greater than what he is receiving, and under other circumstances his capacity might be more important than actual income. But I think, given a situation where he is within 15 months of acquiring a lifetime annuity, some portion of which, under my understanding of the California law, your client is going to be entitled to, and therefore, there is plenty of reason for her best interest to also require him

to continue on until, at least, he has acquired that vested interest. So, I think we all agree, but I don't think you need to go into it.

Mr. Winter: Don't what? What is your ruling?

The Court: I think it is irrelevant. I recognize he could quit tomorrow and he could step out into the private world of medicine and undoubtedly, if he sought to conduct a practice. . . . [Trial Transcript, pp. 30-31.]

* * *

The Court: I don't think it goes back to the no fault business. I think, to the extent you're going into that direction—go ahead.

Mr. Winter: Thank you.

The Witness: May I make a comment?

The Court: No. We deal, Doctor, purely on a question and answer basis. So, all your role will be to answer questions of Mr. Winter or Mr. Silverman. And to the extent a particular question brings forth an answer which you feel requires some explanation beyond the brief answer, you are certainly welcome to give that. But, essentially, we deal with questions and answers.

Mr. Winter: Thank you, your Honor.

Q. Doctor, you were in medical school at the time that you were married; is that correct?

A. That is correct.

Q. And as a matter of fact, you were in medical school before you joined the Army, too?

A. That is correct.

Q. And then, you obtained your medical degree, your internship, your—or first, your residence—no, first, your internship, and then, your residence, your board certifica-

tion, that was all done during the time that you and your wife were married; isn't that right?

A. That's right.

Mr. Winter: All right. I have no further questions. . . . [Trial Transcript, p. 33.]

* * *

Mr. Winter: I didn't know about it.

Mr. Silverman: Is that the only tape?

Lady in the audience: Yeah.

Mr. Collins: Can we hear it?

Mr. Silverman: That is not necessary.

Mr. Collins: Are there any other tapes?

Lady in the audience: No.

Mr. Winter: I'll give it to the clerk.

The Court: That's fine.

Mr. Winter: One more thing I want to be sure about, have we stipulated that Mrs. McCarty is a resident, and was at the time of the filing of this action? I think we have.

Mr. Silverman: Well, he testified to it.

The Court: It's been testified to.

Mr. Winter: I would just like to state then that my stipulation, as well as my fact—perhaps I ought to just ask her a couple of questions because I think her residence is certainly a very important thing, as far as the record is concerned.

Q. Mrs. McCarty, when did you and your husband come here to live?

A. In 1974.

Q. Now, subsequent thereto, did you obtain a California driver's license?

A. Yes.

Q. And when did you do that?

A. In August of 1974.

Q. And did you vote in California?

A. Yes.

Q. And when did you vote in California?

A. I filed for voting registration in the spring of '75 and I have voted in every election since.

Q. Do you consider yourself a California resident?

A. Yes, I pay residence tuition to the state university.

Q. And do you consider yourself a resident?

A. Yes.

Q. How long have you considered yourself a resident of California?

A. Since our arrival in 1974.

Q. Now, prior to that time, where were you a resident?

A. Oregon.

Q. How long has it been since you and your husband has actually been in Oregon?

A. Other than visit?

Q. Yes.

A. We left the state in June of 1959.

Q. You have not lived there since that time?

A. No.

Q. What is the longer period of time you have actually spent in Oregon, any time since 1959?

A. A week, two weeks, vacation visits.

Q. All right. Have you paid—

A. Six weeks I spent in Oregon when I—in the summer of 1960 while my husband, in Texas. I was six weeks living with my parents when I was pregnant with my son.

Q. Your parents live in Oregon?

A. They did at that time, yes.

Q. Do you know whether or not any income tax returns have you filed with the State of Oregon for the past five years.

A. They have not.

Q. Do you know whether your husband has actually lived in Oregon within any time—within the past five years?

A. He has not.

Q. Your husband was paying some money to your mother for her support prior to your separation; is that right?

A. Not my mother.

Q. His mother.

A. Yes.

Q. Prior to separation?

A. Yes.

Q. And how much was he paying her?

A. A hundred and fifty-one a month.

Q. And was she living with you or your husband or the family during that period?

A. No, she was living alone.

Q. She was living alone?

A. Yes.

Mr. Winter: I have nothing further.

CROSS-EXAMINATION

By Mr. Silverman:

Q. Mrs. McCarty, in reference to your schooling, am I correct that you have nine units left before you obtain your B.S. degree?

A. Right.

Q. And I understand you had two years of credit before your marriage; is that correct?

A. Correct.

Q. And then, you started going back to school part time in approximately 1971?

A. Correct. . . . [Trial Transcript, pp. 46-48.]

* * *

REDIRECT EXAMINATION

By Mr. Collins:

Q. Doctor, have you ever registered to vote or voted in any other state besides Oregon?

A. No, I have not.

Q. And last time you voted, which state did you vote?

A. In Oregon.

Q. And when was that?

A. In 1968.

Q. When did you first maintain and establish a residence in Oregon.

A. In 1956 probably.

Q. And while you were going to medical school, did you inform the school that you intended to remain in Oregon, and did you begin paying tuition to the medical school as a resident?

A. I—yes. I became a official Oregon resident at the time—by the legal definition of resident—tuition, et cetera.

Q. And you consider—at that time, did you consider Oregon to be your home?

A. Yes, that is correct.

Q. Do you consider yourself to be domiciled in California?

A. No, I do not.

Q. Since obtaining the Oregon residency, have you been an officer or with the military service since that time?

A. Since I left the state, yes. I, actually, was not in the military at the time I got it. Then, entered the military during my last year of medical school, and have been with the military ever since I left Oregon.

Q. So, there was no break between your establishment of Oregon residency and domicile in Oregon and your joining the military?

A. I'm sorry, no break. They weren't done simultaneously. There was no moving anywhere.

Q. You remained in Oregon?

A. I was in the same place, that is correct.

Mr. Collins: I have no further questions, your Honor.

Mr. Winter: No further questions, your Honor.

The Court: You can step down.

The Witness: Thank you.

Mr. Winter: From our side of the case, your Honor, we only have one more matter, and that is the question of counsel fees.

I have submitted to the Court, attached to our declaration, a statement setting forth fees as of to date, and added to that should be an additional $1,100 for today, and also, anticipated for the memorandum that I will now have to prepare in opposition to counsel's memorandum. In other words, I have computed another $400 for today and $300 for three to four hours worth of research that will now have to be done, and including the preparation of the additional memorandum.

So, we, therefore, are asking for counsel fees in addition to what was previously received in the amount of another $3,000. If the Court would prefer, I will take the stand and testify as to that. Depends on the Court and counsel. I am certainly prepared to do so.

Mr. Silverman: What do you mean by testify?

Mr. Winter: As to the amount of time that we have put in on the case, and also, to the amount of time and our fees . . . [Trial Transcript, pp. 55-56.]

FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

MOTION TO DISMISS OR AFFIRM

WALTER T. WINTER
100 Bush Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 433-5580
Counsel for Appellee

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

The Appellee, Patricia Ann McCarty, respectfully moves to dismiss the Appeal herein or, in the alternative, to affirm the Judgment of the Court of Appeal of California in this case. Rule 16(1)(a), (b) and (d).

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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

RICHARD JOHN McCARTY,
Appellant,

VS.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

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MOTION TO DISMISS OR AFFIRM

A

MOTION TO DISMISS

Appellee moves to dismiss this Appeal for want of jurisdiction, and because the federal question sought to be reviewed was not properly raised below. Rule 16(1)(a), (b).

The statutory provision under which Appellant invokes this Court's jurisdiction—28 U.S.C. § 1257(2)—requires that the state court decision to be reviewed must have "drawn in question the validity of a statute of any state" on the grounds of a claimed repugnance to Federal law.

At *no point* in the proceedings below has Appellant ever drawn in question the *validity* of the California statute regarding quasi-community property (California Civil Code § 4803), nor has Appellant claimed that application of said statute to him renders that statute void. Rather, throughout the proceedings below, to the extent that Appellant has asserted any Federal claim whatsoever,[1] he has consistently asserted only that the application of California Civil Code § 4803 to him impairs rights granted to him by Federal statute.[2]

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[1]Although Appellant states that there is no transcript of the oral proceedings before the California Superior Court (Trial Court herein), in fact, such a transcript does exist and was referred to extensively by both parties in the briefs filed with the California Court of Appeal. Said Reporter's Transcript on Appeal was certifield by the Court Reporter on June 22, 1977; the Notice of Completion of Transcripts on Appeal was mailed by the Clerk of the Superior Court August 22, 1978 pursuant to Rule 8(a) of the California Rules on Appeal; and said Transcript was thereafter certified by said Clerk on Appeal.

An examination of said Reporter's Transcript reveals that neither party raised any federal question or issue whatsoever in the oral proceedings and oral argument at trial herein.

[2]Appellant's Trial Brief submitted by him to the Trial Court herein (filed May 20, 1977) raises no issue or claim whatsoever regarding validity or invalidity of a California statute. Said Trial Brief discusses only the issues of domicile (which are not subject of Appellant's appeal to this Court) and an assertion that Appellant's pension rights are nondivisible by the California Court because nonproprietary in nature.

Appellant's Post Trial Brief submitted to the Trial Court herein and filed May 20, 1977 again raises no claim or issue of invalidity of a state statute, and urges instead that "Petitioner's [Appellant herein] Federal pension 'rights' are neither 'vested' nor 'matured' within the meaning of *In Re Marriage of Brown* (1976) 15 C.3d

The California Court of Appeal in the present case was not asked to—and did not—address the issue of validity or invalidity of a state statute. The Court below was asked only to rule upon Appellant's assertion and claimed impairment of Federally created rights; and that is the only Federal claim or issue addressed by the decision of the Court below. The decision below rests squarely and exclusively on the decision of the California Supreme Court *In Re Marriage of Fithian* (1974) 10 C.3d 592, *cert. den.* 419 U.S. 825. *Fithian,* like the present case, deals solely with a claim of impairment of Federal rights, and does not draw in question the validity or invalidity of a state statute on any grounds.

Appeal to this Court does not lie from a state court denial of an assertion of Federal rights or privileges. *Mergenthaler Linotype Company v. Davis* (1919) 251 U.S. 256, 259; *Jett Bros. Distilling Company v. Carrollton* (1920) 252 U.S. 1; *Rohr Aircraft Corporation v. San Diego County* (1960) 362 U.S. 628; *Hanson v. Denckla* (1958) 357 U.S. 235, 244. "The mere objection to an exercise of

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838, and hence Petitioner has no property interest subject to division by this Court."

Appellant's Briefs to the California Court of Appeal below consistently asserted only that "California's Quasi-Community Property Scheme conflicts impermissibly with *rights* granted the husband under Federal legislation governing Army retirement pay" (Appellant's Opening Brief, Page 10); and that Appellant's "entitlement" to certain retirement pay may not be "diminished" by application of state law (Appellant's Opening Brief, Page 12).

Thus, although Appellant's contentions below have been inconsistent, the one consistency that does appear from all of his contentions is that he has never at any point in the proceedings below darwn in question the validity or invalidity of a California statute.

authority under a statute whose validity is not attacked cannot be made the basis for a writ of error from this Court." *Jett Bros. Distilling Company v. Carrollton*, 252 U.S. 1, at 6.

Appeal herein does not lie, and should be dismissed.

B

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the Judgement of the California Court of Appeal for want of a substantial federal question.

1. This Court Has Recently Declined Review of This Same Question.

The question presented by Appellant does not warrant plenary consideration by this Court. Since this Court's decision in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court has twice been asked to review the same issue regarding military retirement and has twice denied such review. *Starren v. Starren* (California, 1979) (No. 78-1691) *cert. den.* 47 L.W. 3222, 62 L.Ed.2d 110; *Chisnell v. Chisnell* (Michigan, 1978) 267 N.W.2d 155, *cert. den.* 442 U.S. 940, 61 L.Ed.2d 310, *reh. den.* October 1, 1979.

In *Chisnell*, the decision of the Michigan Court below specifically cited the California case of *Fithian*, the same case relied upon by the California Court of Appeal in the Judgment herein.[3]

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[3]This Court has also denied review, post-*Hisquierdo*, in several cases presenting the issue of whether the Employment Retirement

2. The Question Is Not Important.

Plenary consideration of a question by this Court is not warranted simply because the Courts of various states—including both community and noncommunity property states—may give different treatment to military pensions or retirement benefits upon a divorce or dissolution of marriage.[4] Different states may also treat differently pensions in general, or houses, or the earnings of either spouse in accordance with each state's laws governing marriage and termination of marriage. Such variation and inconsistency, far from constituting an evil in need of correction by this Court, is a natural outgrowth of the peculiarily local character of Family Law. *In Re Burrus* (1890) 136 U.S. 586, 34 L.Ed. 500, 10 S.Ct. 850; *Buechold v. Ortiz* (9th Cir. 1968) 401 F.2d 371.

Appellant's attempts to find in such local variation a threat to the volunteer army ignores the well-established doctrine that a service member's domicile does not automatically follow that service member from one assignment

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Income Security Act precludes division of private pensions on dissolution of marriage. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California v. Johns* (No. 78-1422) Appeal dismissed, *cert. den.* 48 LW 3451; *Southern California IBEW-NECA Pension Plan v. Johnston* (No. 78-1445) *cert. den.* 48 LW 3452; *Carpenters Pension Trust Fund for Northern California v. Campa* (No. 78-1881) Appeal dismissed 48 LW 3451; *Trustees of Operating Engineers Pension Trust v. Pilatti* (No. 79-1076) *cert. den.* 48 LW 3569; *Operating Engineers Pension Trust v. Lionberger* (No. 79-1253) *cert. den.* 48 LW 3748.

[4]On July 17, 1980, the California Supreme Court unanimously reaffirmed that *Hisquierdo* does not preclude application of California community property laws to military pensions. *In Re Marriage of Milhan* (L.A. 31191). (Superseded opinion cited in Appellant's Jurisdictional Statement, Footnote 7).

station to another, but is, in each instance, a question of fact to be determined from the conduct of the individual service member involved. *Finger v. Masterson* (1957) 152 F.Supp. 224; *Wise v. Bolster* (1940) 31 F.Supp. 856; *Sweeney v. District of Columbia,* 113 F.2d 25, *cert. den.* 310 U.S. 631.

Furthermore, the incentive to forum shopping, if any, presented by variation among different states' laws regarding military pensions and retirement benefits after divorce is no greater than the incentive to forum shopping, if any, presented by the comparative ease or difficulty of obtaining a divorce or dissolution in various states, or the variation among various states regarding alimony and/or spousal support policies.

Finally, to the extent that any variation and/or inconsistencies may exist between the various types of military retirement plans and benefits for different branches of service, annuity programs, survivor benefit programs, and other similar benefits and plans provided by Congress for military personnel, such variations and/or inconsistencies are the creation of Congress, and the decision to create or not create uniformity among such benefit plans and programs properly rests with the Congress.

3. Hisquierdo Is Unique.

This Court's decision in *Hisquierdo* addresses only retirement benefits under the Railroad Retirement Act and the unique provisions of that Act. When Appellant asserts in his jurisdictional statement that "there is nothing unique in the structure of the Railroad Retirment System, which

makes it appropriate to limit *Hisquierdo* to railroad retirement benefits . . ." Appellant simply ignores the reasoning of this Court as stated in the *Hisquierdo* opinion, which opinion reaches the result it does specifically because the Railroad Retirement Act is unique, and does certain statutory provisions unique to it.[5]

Very simply, Appellant can point to no provision of Federal statute governing either Army retirement benefits specifically, or military retirement benefits in general, which is comparable to 45 U.S.C. § 231m in the Railroad Retirement Act. Appellant points only to 10 U.S.C. § 3929, which section does nothing more than direct the reader's attention to the proper section of the code for *computation* of the amount of Army retirement benefits.[6] This section simply will not support the great significance that Appellant attempts to attribute to it.

Central to this Court's decision in *Hisquierdo* was the anti-assignment and anti-anticipation provisions of § 231m. But with respect to the military, not only has Congress failed to include an anti-anticipation provision in any of

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[5]The specific code section on which this Court focused in the *Hisquierdo* opinion, 45 U.S.C. § 231m. provides,

> "Notwithstanding any other law of the United States or of any state, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or garnishment, attachment, or any other legal process under any circumstances whatsoever, *nor shall payment thereof be anticipated* . . . ." (Emphasis added.)

[6]10 U.S.C. § 3929 provides:

> "A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title."

the statutes governing Army or military retirement and pension benefits, but in statutes governing assignability of Army pay in general, Congress has specifically stated that an *officer* of the Army *may assign* his pay.[7]

In the realm of Family Law, this Court has historically limited its review of alleged conflicts between state Family Law and Federal statute under the Supremacy Clause to determine whether Congress has "positively required by direct enactment" that state law be pre-empted. *Hisquierdo,* 439 U.S. at 581. The test requires that state family and family property law must do "major damage" to "clear and substantial" federal interests before this Court will find federal law to have overridden state family law. *Ibid.* Congress has not spoken so clearly with respect to military retirement. In fact, federal rulings have recognized the community property character of military retirement income. Revenue Ruling 63-169, 26 C.F.R. 1.37-3.

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[7] 37 U.S.C. § 701(a):

"Under regulations prescribed by the Secretary of the Army . . . a commissioned officer of the Army . . . *may* transfer or assign his pay account, when due and payable." (Emphasis added.)

37 U.S.C. § 701(c):

"An enlisted member of the Army . . . *may not* assign his pay, and if he does so, the assignment is void." (Emphasis added.)

CONCLUSION

Appellee urges that this Court should dismiss the appeal herein, for want of jurisdiction under 28 U.S.C. § 1257 (2). Furthermore, Appellee urges that the appeal herein be dismissed, or in the alternative, that the Judgment of the California Court of Appeal hereinbelow be affirmed, for want of a substantial federal question.

Dated: July 25, 1980.

Respectfully submitted,

WALTER T. WINTER
Counsel for Appellee

Supreme Court, U.S.
DEC 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLANT'S BRIEF ON THE MERITS

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
332 Pine Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 421-1100
Counsel for Appellant

December 4, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

Does the system of military retirement benefits established by the Congress preempt the State of California from treating Army retired pay as community property divisible upon divorce?

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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

VS.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

---

APPELLANT'S BRIEF ON THE MERITS

Appellant ("the Husband") requests this Court to reverse the decision of the California Court of Appeal awarding Appellee ("the Wife") a 43% property interest in the Husband's Army retired pay.

OPINIONS BELOW

The opinion of the Court of Appeal is unreported. (J.S., App. A) The Memorandum of Intended Decision issued by the Superior Court for the City and County of San Francisco is also unreported. (J.S., App. B) The California Supreme Court rendered no opinion when it denied appellant's Petition for Hearing (J.S., App. C).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This is an appeal in which the validity of a statute of the State of California is drawn into question on the ground of its being repugnant to the laws of the United States. The state court decision appealed from is in favor of its validity.

The Court of Appeal denied the Husband's appeal by order and opinion entered February 6, 1980. On March 17, 1980, the Husband filed a Petition for Hearing within the period prescribed by Rule 28 of the California Rules of Court, before the Supreme Court of California. That Petition was denied by order dated April 3, 1980. The Husband then petitioned this Court for a hearing on June 30, 1980. This Court granted the hearing by order dated October 20, 1980, 49 U.S.L.W. 3289, reserving jurisdiction until hearing the merits of the dispute.

The Wife has moved under Rule 16(1)(a), (b) "to dismiss this Appeal for want of jurisdiction, and because the federal question sought to be reviewed was not properly raised below."

Section 1257 of Title 29 refers to "[f]inal judgments or decrees rendered by the highest court of the State in which a decision could be had." The Husband raised the federal preemption issue, i.e. that application of § 4803 of the Cal. Civ. Code to the Husband's Army retired pay was repugnant to the laws of the United States, before the highest court of California in which a decision could be had, and, indeed, raised it before each court.

(1) In his opening brief before the Court of Appeal, dated October 17, 1978, the Husband formulated the second issue presented as follows:

> "Does federal law relating to Army retirement pay preempt the application of § 4803 Civil Code to allo-

> cate the husband's right to receive future pension payments to the Wife?"

In addition to arguing the federal preemption issue in that memorandum, the Husband filed a reply memorandum on February 22, 1979, forwarding a slip opinion for the attention of the Court of Appeal, of the decision of this Court entered on January 22, 1979 in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, which had then just recently issued. In this reply memorandum, the Husband argued that the *Hisquierdo* decision had strengthened the Husband's argument that § 4803 was repugnant to federal law in its application to Army retired pay. On April 29, 1979, the Wife was granted special leave to file a supplemental brief. By memorandum dated July 3, 1979, filed pursuant to special leave, the Husband again argued the federal preemption issue. The conclusion to that memorandum summed up "[t]hat the *Hisquierdo* decision confirms the establishment of a federal scheme re military retirement pay which preempts state law."

In its order and opinion the Court of Appeal summarized the Husband's arguments as follows (J.S. 57):

> "The Husband also contends that the Federal scheme of military retirement benefits preempts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits as the interlocutory judgment orders."

In his petition to the California Supreme Court the Husband presented the issue as follows:

> "Has the Federal law preempted the application of California's community property regime so as to bar the Wife's claim under § 4803 of the Civil Code to an

allocable portion of the Husband's army retirement pay?"

The Husband raised similar arguments before the Superior Court.[a]

It is clear that the claim of repugnancy of California's quasi-community property statute, as applied to Army retired pay, to federal law was brought to the attention of the appropriate state court with fair precision, in due time, and with adequate presentation. *Street v. New York,* 394 U.S. 576 (1969); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928).

If, for any reason, the Court determines that the case is not properly before it on appeal, the Husband requests that his Jurisdictional Statement be treated as a Petition for Certiorari under 28 U.S.C. § 2103 and that certiorari be granted.

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[a]The Husband filed two memoranda with the Superior Court arguing that under federal law he had "no proprietary interests subject to division upon marital dissolution" in his contingent Army retired pay, so that California could not apply its quasi-community property concepts to award a portion of his retired pay to the Wife. (Memorandum dated April 8, 1977, R. 105, 112-115; and Memorandum dated April 22, 1977, R. 163, 167-68). The Husband supported his position by forwarding the full text of the decision of the California Court of Appeal in *Hisquierdo v. Hisquierdo,* 63 Cal. App.3d 230, 133 Cal.Rptr. 684 (1976). That decision determined that Federal law would be frustrated if a railroad worker were required to turn over an allocable share of his retirement benefits to an ex-spouse under a California community property award. (The entire text of the decision in that case was made part of the record. R. 170-173).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provision:

Article VI, clause 2 (Supremacy Clause)

The principal federal statutes involved in this Appeal are the following:

10 US.C. § 1447 (3) (Survivor Benefit Plan)

10 U.S.C. § 3504(a) (Recall to Active Duty)

37 U.S.C. § 701(a) and (c) (Army pay anti-assignment clause)

42 U.S.C. § 402(b) (Social Security Act)

42 U.S.C. § 659(a) (Social Security Act)

42 U.S.C. § 662(c) (Social Security Act)

The principal state statutes are the following:

Cal. Civ. Code § 4803 (Quasi-Community Property)

Cal. Civ. Code § 5105 (Interests of Parties in Community Property)

Reference is made in this memorandum to other federal and state statutory provisions listed below. The principal statutes involved and all the following are reproduced in pertinent part in the appendix of statutory material.

Federal:

5 U.S.C. § 8345(j)(1) (Civil Service Retirement)

5 U.S.C. § 5532 (Dual Compensation Act)

10 U.S.C. § 227(a)

10 U.S.C. § 675 (Recall to Duty of Retired Reserve)

10 U.S.C. § 802(4) (Code of Military Justice)

10 U.S.C. § 886

10 U.S.C. § 1335(c) (Recall of Members on Inactive Status List)

10 U.S.C. § 1434 (Family Protection Act)

10 U.S.C. § 1440 (Assignment of Annuities)

10 U.S.C. § 1450 (Payment of FPP Annuities)

10 U.S.C. § 2771 (Accountability and Receivability)

10 U.S.C. § 3889 (Computation of Length of Service Retired Pay)

10 U.S.C. § 3911 (Retirement)

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10 U.S.C. § 3929 (Computation of Retired Pay)

10 U.S.C. § 6482

10 U.S.C. § 8504 (Recall of Retired Regular Air Force)

11 U.S.C. § 523(a)(5) (Bankruptcy Act, Exceptions to Discharge)

14 U.S.C. § 331 (Recall of Retired Coast Guard)

15 U.S.C. § 1673 (Consumer Credit Protection Act)

18 U.S.C. § 281 (Limitations on Retired Army)

22 U.S.C. § 1104 (Foreign Service Anti-Assignment)

31 U.S.C. § 203 (Anti-Assignment Act)

38 U.S.C. § 401(a) (Dependency and Indemnity Compensation)

41 U.S.C. § 15 (Anti-Assignment Act)

42 U.S.C. § 410(a)(6)(A)

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State

Cal. Civ. Code § 4800(b)(1) (Division of Quasi-Community Property)

Cal. Civ. Code § 4801(a)(9) (Spousal Support Order)

Cal. Civ. Code § 4804

Cal. Civ. Code § 4806 (Awards from Separate Property)

Cal. Civ. Code § 5518 (Earnings as Separate Property)

Cal. Civ. Code § 5125 (Disposition of Community Property)

Cal. Civ. Code § 5150

Cal. Code of Civ. Procedure § 690.18 (Exemptions from Execution)

STATEMENT OF THE CASE

The Husband petitioned the Superior Court for the City and County of San Francisco for divorce on December 1, 1976. (J.A. 1). The Husband asked for custody of the three minor children of the marriage (J.A. 2); listed his assets (J.A. 17-29); and claimed to the Superior Court that "all military retired benefits" which he expected to receive were his separate property (J.A. 2) and hence not subject to division by the divorce court under California's community property regime (R. 115). The Wife responded, asking for dissolution of the marriage (J.A. 8); custody of the minor children and child support (J.A. 9); alimony of $1,000 per month (J.A. 15) and for a division of all community property funds including the Husband's contingent interest in his future military retirement pay (J.A. 8-9).

The parties were married on March 23, 1957 (J.A. 1), when the Husband was in his second year in medical school in Oregon (J.A. 32). In his fourth year in medical

school, the Husband went on active duty with the Army (J.A. 32). At the time the parties separated, the marriage had lasted 19 years, seven months (J.A. 40). The Husband had served 220 months of the 240 months (20 years) required for eligibility for receipt of Army retired pay (J.A. 33; R. 120).

At the time of the divorce petition, the Husband was an Army physician, with the rank of Colonel and had been stationed in San Francisco for two and one half years at the Presidio Military Reservation (J.A. 32).

Prior to his Army transfer to San Francisco, the Husband had been stationed in Texas for five years; in California for four years; in Hawaii for three years; in Washington, D.C., for two years; in Pennsylvania for one year; and in Oregon for one year. (J.A. 32).

The Superior Court awarded the Wife $500 alimony per month for support (J.A. 44); custody of the three minor children to the Husband, without requiring the Wife to make any child support contribution (J.A. 44); and divided the available cash and the value of two vehicles between the spouses (J.A. 45). The Court separately determined that the Husband's "retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to Section 4803 of the Civil Code."[b] (J.A. 45) The formula to be applied was stated as follows:

> [P]etitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half (½) of the

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[b]Section 4803 of Cal. Civ. Code (West Supp. 1980) defines "quasi-community property" as "all real or personal property, wherever situated, heretofore or hereafter acquired . . . [b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition."

> ratio of the total time between marriage and separation during which petitioner was in the United States Army to the total number of years he has served with the United States Army at the time of retirement, and the Court retains jurisdiction to make such determination at that time and to supervise distribution thereof. (J.A. 45-46)

The Husband had objected to such division claiming the court lacked power to allocate to the Wife any portion of his expectancy in Army retired pay. He argued that he was an Oregon and not a California domiciliary, so that California could not apply quasi-community concepts to his Army retired pay. In any event, Army retired pay could not under Federal law be allocated to an ex-spouse.

The Husband appealed so much of the decision of the Superior Court as dealt with the division of Army retired pay. The parties thereafter stipulated that the Husband would pay that portion of the Army retired pay due him but allocable to the Wife under the order of the Superior Court into a trust account administered by counsel for both parties, pending the conclusion of all appeals (J.A. 47-48). The stipulation was confirmed by order of the Superior Court (J.A. 49-50).

Upon retirement, the Husband began receiving monthly retired pay of $1,507.86. The entitlement of the Husband has varied in amount by virtue of the application of the Dual Compensation Act, 5 U.S.C. §§ 5531 *et seq.*, and changes in the cost-of-living index to which Army retired pay is currently tied.

Before the Court of Appeal the Husband pressed the argument that § 4803 as applied to Army retired pay was repugnant to federal law, relying especially upon the decision of this Court in *Hisquierdo v. Hisquierdo,* 439 U.S.

572 (1979). Despite extensive briefing by the parties on the subject of federal preemption, the Court of Appeal, in affirming the decision below, devoted itself in its opinion and order primarily to other matters (J.S. 32-56). It disposed of the federal preemption issue in a brief discussion (J.S. 57-60), distinguishing *Hisquierdo* on the authority of *Gorman v. Gorman,* 90 Cal.App. 3d 454, 153 Cal.Rptr. 479 (1979), and resting its holding on *In re Marriage of Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974).

SUMMARY OF ARGUMENTS

Federal law bars California from applying its quasi-community property regime to Army retired pay. California's divorce court may not award an interest in the Husband's Army retired pay to his ex-spouse.

1. The Congress has established a comprehensive and detailed system for inducing young men to join and remain in the Army; and it has also enacted provisions designed to reduce the number of older, career Army men in service by forced attrition. The statutory system is carefully balanced to promote the realization of both sets of objectives. Interrelated programs provide benefits to the Army member, his spouse, his ex-spouse, and to his widow. Certain benefits to the ex-spouse and to the widow are structured through the Social Security System. A Survivor Benefit Plan 10 U.S.C. §§ 1447-1455, funded in part through tax revenues, provides an annuity to the widow. And Army retired pay, 10 U.S.C. §§ 3991-3992, is paid, again from public funds, to the former member as his "personal entitlement."

The Congress intended that this system of benefits operate in uniform fashion and on a national scale. The Congress did not intend that the serviceman, compelled to

serve at stations designated by the Army, would be subjected to the vagaries of local law in a manner which would deprive him of those benefits which the Congress had targeted him to receive.

2. Title 37 U.S.C. §§ 701(a) and (c), anti-assignment provisions, bar the anticipation of Army retired pay through state community property awards. This conclusion is strengthened by amendments to the Social Security Act, made applicable to members of the Armed Forces. 42 U.S.C. §§ 659(a) and 662(c). In these amendments, the United States has consented to be sued in garnishment proceedings to enforce support decrees issued by state courts. However, the Congress refused to extend this consent to permit garnishment of Army retired pay to satisfy community property awards.

The aggressive use of community property awards of military retired pay had been prompted by the inability of ex-spouses to enforce support awards. By applying property concepts to Army retired pay, the ex-spouse could have the state court determine a value for the retired pay expectancy of the Army spouse and take her share of that value from other assets belonging to the community.

By creating a mechanism in the Social Security Act amendments for enforcing support awards, the Congress undercut that rationale. The action of the Congress also represents a cautious approach towards the adoption, in the area of military retirement payments, of social policy preferences embraced by a minority—the community property—states.

3. The scheme of benefits designed by the Congress for the former member is inconsistent with the division of Army retired pay by California divorce courts. The scheme set forth in the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1456, prefers the widow and ignores the ex-spouse. But in

practical application, the ex-spouse who collects an allocable portion of the Army retired pay of a former member, through a community property award, secures a more advantageous position for herself when compared with the widow.

The choice by the Congress to exclude the ex-spouse was deliberate; the Congress intended to prefer the widow, and it rejected benefits for the ex-spouse. In these circumstances, California divorce courts upset the balance of carefully measured federal benefits which the Congress has struck.

Legislative history associated with Army retired pay and with its adjunct programs, the annuity plans, supports the conclusion that the Congress has always considered Army retired pay to be a personal entitlement of the former member.

4. California divorce courts allow the ex-spouse to claim an equal interest in Army retired pay not as a creditor of the former member, but as a co-owner of the entitlement to the benefit. The ownership argument, however, proves too much. The Congress did not contemplate that an ex-spouse who predeceased the Army retiree should be able to pass on her entitlement to Army retired pay, as property, to her heirs. Nor did the Congress anticipate she might compel the army member to continue in active service, against his wishes, so as to protect her entitlement to retired pay; nor, that she might compel him to resign from the Army, when he does not wish to do so, after having completed his twenty-year service eligibility, so that she may secure her property interest immediately in the retired pay.

The ownership of the non-Army spouse in Army retired pay is non-existent until the Army sends the serviceman spouse to a community property state. That transfer alone suddenly enriches the non-Army spouse. The gain to her

property interests embraces not only future service time still required by the Army from the member to qualify for retired pay. If either spouse files for divorce in California, the application of § 4803 of the Civil Code, the quasi community property provision, will enrich the non-Army spouse with a state directed award for up to half the Army retired pay. All completed service time by the Army member served outside California will be treated by the California divorce courts as if it had been served in California. The possibility of such sudden enrichment of the spouse and correlative impoverishment of the Army member was not intended by the Congress.

5. The Congress established Army retired pay as compensation to the retired army members for remaining in the Army on a special basis, performing reduced services for reduced pay. The retired member remains subject to the Code of Military Justice, 10 U.S.C. § 802(4); and he remains vulnerable to recall to active duty at any time. 10 U.S.C. § 3504(a). His status is such that he earns his payment as wages, from day to day. His compensation is not a pension given as a gratuity; nor is it deferred compensation for past services. In this regard the situation of the former Army member differs from the retired federal civil servant and the member of the foreign service.

The relationship to the Army of the former member receiving retired pay is ignored by California divorce courts. California assumes it can characterize Army retired pay freely, as it chooses, believing that federal law places no constraint upon its right to do so. California chooses to characterize Army retired pay as deferred compensation paid to the former member for his past services to the Army. This characterization renders retired pay eligible, under California's community property concepts, for equal division between the spouses.

But California cannot apply its rules to determine the nature of retired pay. Because the retired pay is given for current services, the pay represents wages. As such, Army retired pay is not divisible under federal law; and even under California law, wages earned after divorce are separate property, rather than community, and therefore cannot be divided.

In the division of Army retired pay the clash between federal law and principles of community property law as applied by California divorce courts must be resolved by reference to the Supremacy Clause. California's insistence that it apply community property concepts to Army retired pay so as to confer benefits upon an ex-spouse must give way.

ARGUMENT

I

INTRODUCTORY MATTER

A. The Preemption Argument.

California's divorce courts applying community[1] or quasi-community property[2] principles allocate to the ex-spouse a portion of the expectancy which the Army ser-

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[1]The heart of California's community property scheme is §5105 of the Civil Code (West, Supp. 1980). It provides that "interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."

[2]The doctrine of quasi-community property is encompassed in its entirety in § 4803 of the California Civil Code (West, Supp. 1980). Civ. Code § 4800(b)(1) (West, Supp. 1980) allows the court to "award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." Once property is classified as quasi-community property, it is treated as community property. *Cooper v. Cooper*, 269 Cal.App.2d 6, 74 Cal.Rptr. 439 (1969).

viceman spouse has in receiving future Army retired pay.[3] Such divisions of Army retired pay are repugnant to the federal statutes which relate to Army retired pay. The awards by the divorce courts of a portion of such pay to an ex-spouse do "major damage to clear and substantial federal interests," within the meaning and intendment of *Hisquierdo*, 439 U.S. at 581.

Hisquierdo provides guideline rules for analyzing the conflict between federal requirements and state community property allocations of federally-created retirement benefits.[4] *Hisquierdo* found that federal law conflicts with awards by California divorce courts of Railroad Retirement Act benefits; under the Supremacy Clause, state law in such circumstances must give way. The *Hisquierdo* analysis compels a similar result in this case with respect to the

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[3]The major California cases which have divided Army retired pay are *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied*, 419 U.S. 829 (1974); *Gorman v. Gorman*, 90 Cal.App. 2d 454, 153 Cal.Rptr. 479 (1979). The most recent exposition of the views of the California Supreme Court on the subject of division of military retired pay benefits appears in *In re Marriage of Milhan*, 27 Cal.3d 765, 166 Cal.Rptr. 533 (1980), which concerned the division of Navy retired pay. That decision appeared after the Jurisdictional Statement in this appeal had already been filed. *See also In re Marriage of Milhan*, 13 Cal.3d 129, 117 Cal.Rptr. 809, 529 P.2d 1145 (1974), *cert. denied*, 421 U.S. 975 (1975).

[4]In *Hisquierdo*, the elements singled out for special concern were an anti-assignment statute, 45 U.S.C. § 231m, which ensured that Railroad Retirement Act benefits reach the entitled worker; a statutory scheme funded in large part by public funds, rather than contributions by employer and employee; and a separate spousal benefit. Beyond the technical elements, the *Hisquierdo* court considered the federal need for uniformity of result in assuring benefits to the targeted individual, 439 U.S. at 584; and, in the ultimate sense, whether the "flow of incentives" which the Congress had established in the Act to realize its objectives would be impeded by a community property award to an ex-spouse. 439 U.S. at 585.

divorce court award to the Wife of an expectancy in the Husband's Army retired pay.

It is not possible to harmonize California's community property scheme with the federal system for Army retired pay.[5] Under California's community property system, an equal division between husband and wife is made at the time of divorce of all property acquired during the marriage. This division is made purely on the basis of ownership, without regard to the needs of either spouse.[6]

The federal scheme for Army retired pay is entirely a creation of the Congress. There is no contractual element whatever associated with Army retired pay, and the serviceman makes no contribution to any fund as a condition for receiving retired pay.

The Congressional scheme is concerned with the creation of a strong Army. Through various incentives, including retired pay, the Congress seeks to attract young and vigorous youth to the Army; to encourage or compel older members to retire from active service; and to retain retired members on a standby basis for recall to active service as long as their physical condition will permit.

The elements of the federal statutory scheme which individually and together support a conclusion of federal pre-emption include the following:

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[5]This Court has on five previous occasions found federal pre-emption of state community property laws which in their application were repugnant to federal statutes. In addition to the decision in *Hisquierdo*, the Court did not permit community property concepts to apply in *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1949); and *McCune v. Essig*, 199 U.S. 382 (1905).

[6](West, Supp. 1980).

(1) Strong anti-assignment provisions which insure that Army retired pay will actually be received by the former Army member.

(2) A mandatory recall status for Army personnel receiving retired pay which insures that at any time the President can recall the former member to active duty. The retired Army officer remains in the Army, on special terms, receiving current pay on a reduced basis for reduced services.

(3) A carefully balanced system of mandatory (i.e., social security) and voluntary (i.e., annuity plan) benefits for the former member receiving Army retired pay, for his spouse, ex-spouse, and widow.

(4) A recognition by the Congress of the right of an ex-spouse or dependent child to invade Army retired pay for support according to need; and a refusal to recognize the claim of an ex-spouse to a property interest in such pay.

B. Army Retired Pay.

Army retired pay can be traced at least as far back as Civil War days.[7] For members of regular Army components, the current system distinguishes between retirement for age, 10 U.S.C. §§ 3883-3889, and retirement for length of service, 10 U.S.C. §§ 3911-3929. With respect to both categories, the member is "entitled to retired pay

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[7] *Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Armed Services Committee*, 95th Cong., 1st and 2d Sess. 5 (1977-1978) (statement of Col. Leon S. Hirsch, Jr.). Pensions, which are gratuities, differ from retired pay. They were given earlier to veterans of the Revolutionary War. *Walton v. Cotton*, 60 U.S. 355 (1857).

computed under Chapter 371 of this Title" (10 U.S.C. §§ 3991-3992).[8]

With respect to length of service, 10 U.S.C. § 3914 allows an enlisted man who has at least 20 but fewer than 30 years of service to be retired upon his request. If his request is granted, he becomes a member of the Army Reserve, and in that capacity "shall perform such active duty as may be prescribed under law" until his combined service equals 30 years. Under 10 U.S.C. § 3911, an Army officer may request to be retired after 20 years of service.

The incentive of a 20-year retirement program is designed to induce the youth of the country to join the Army and to remain for extended service. But there are disincentives for an officer remaining in the Army after 20 years. An officer who is passed over for promotion, if he has at least 20 years of service, must be retired. 10 U.S.C. § 3913. Under 10 U.S.C. § 3915, members of the Women's Army Corps must retire after completion of 25 years of service. For other categories there are differing mandatory retirement rules.[9]

These provisions operate to make room at the upper levels of the Army for the younger men who are rising in rank and to clear out the older soldiers by forced attrition, thereby ensuring a pyramid structure in which most of the Army consists of younger men. Thus, the Congress has created a system of balanced incentives: an inducement to younger men to stay in the active service of the Army for

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[8]An Army member may also be retired for physical disability, 10 U.S.C. §§ 1201-1221. Retired pay for service in nonregular components of the Army is covered by 10 U.S.C. §§ 1331-1337.

[9]E.g., a promotion list officer in the regular grade of lieutenant-colonel must be retired after he completes 28 years of service. 10 U.S.C. § 3916. The period is extended to 30 years or 5 years in grade for colonels, 10 U.S.C. § 3921; and 35 years for brigadier and major generals. 10 U.S.C. §§ 3922 and 3923.

20 years, and a system of voluntary inducements and mandatory limitations designed to curtail active duty and place members on the retired list.

A principal feature associated with Army retired status concerns recall to active duty. Under 10 U.S.C. § 3504(a), the President "may order any retired member of the regular Army to active duty . . . in the interests of national defense."[10]

The vulnerability to recall distinguishes Army retired pay from a true pension.[11]

Army retired personnel are still officers in the Army of The United States.[12] They remain subject to the Code of

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[10]A parallel provision appears at 10 U.S.C. § 1335(c) for retirees from the Army Reserve. Separate provisions allow the President to recall to active duty retired members of regular components of the Navy and Marines, 10 U.S.C. § 6482, and the Air Force, 10 U.S.C. § 8504.

[11]From *Lemly v. United States*, 75 F.Supp. 248, 249 (Ct.Cl. 1948):

> [W]hen a pension is paid someone, he is considered all through, his services are over, and he is pensioned "off." Furthermore, a pension is paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government. When a person is pensioned "off" by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives.
>
> Retirement pay, on the other hand, is a continuation of active pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject to call to active duty as long as his physical condition will permit. He is still an officer in the service of his country even though on the retired list.

[12]*Kahn v. Anderson*, 255 U.S. 5, 6-7 (1920); *Puglisi v. United States*, 564 F.2d 403 (Ct. Cl. 1977), *cert. denied*, 435 U.S. 968 (1978).

Military Justice.[13] They sit as officers on court-martial tribunals.[14] They may lose part of their retired pay if they take a Federal Civil Service job,[15] or all of it if they give up U.S. citizenship;[16] take on employment by a foreign government;[17] or perform certain proscribed activities during their retired status.[18]

Although the Army member makes no contribution from active duty pay toward receipt of future retired pay, since 1957 he has been required to make Social Security contributions out of his active duty pay. 42 U.S.C. § 410(l) (1)-(4). Upon reaching the necessary age qualifications, the Army retiree, his spouse, his ex-spouse, and dependent children are entitled to payments from Social Security.[19] If the serviceman does not complete his 20 years and does not become entitled to Army retired pay, both he and his spouse may find themselves only with Social Security benefits.[20]

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[13]10 U.S.C. § 802 (4).

[14]*Hooper v. Hartman,* 153 F.Supp. 437, 442 (S.D. Cal. 1958), aff'd, 274 F.2d 429 (9th Cir. 1959).

[15]5 U.S.C. §§ 5531, *et seq.*

[16]58 Comp.Gen. 566 (1979).

[17]U.S. Const. art. I, § 9, cl. 8; *Watson v. Watson,* 424 F.Supp. 866, 869, (E.D.N.C. 1976).

[18]*Chambers v. Russell,* 192 F.Supp. 425, 427 (N.D. Cal. 1961). *See also* 18 U.S.C. § 281 (a retired officer may not sell to the United States through a department in whose service he holds a retired status); 37 U.S.C. § 801(c) (no retired pay to one who sells supplies to the military).

[19]42 U.S.C. § 402(a) spells out the former member's benefits; § 402(b), those of his spouse and ex-spouse. Section 402(b)(3) requires that the ex-spouse must have been married to the former member at least ten years.

[20]In this regard, the serviceman differs from members of the Federal Civil Service and the Foreign Service. In neither of these two cases does the member make any contributions to the Social Security system or receive Social Security benefits. 42 U.S.C. § 410(a)(6)(A).

The spouse and the ex-spouse both become entitled to benefits solely on the basis of the serviceman's contributions. 42 U.S.C. § 402(b).

A second adjunct program to Army retired pay is the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, successor to the earlier Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-1446.[21] The plans are voluntary in nature. They allow an Army retired member to make deductions from his retired pay to support an annuity payable to his widow or children upon his death. In its current form, the retiree must turn down participation in the plan in order to avoid deductions from retired pay. 10 U.S.C. § 1448(a)(3)(A) (Supp. 1980). There is a statutory inducement from him not to waive participation in the plan. 10 U.S.C. § 1452 (Supp. 1980).

If Social Security benefits are paid to the widow, the amount of the annuity she is eligible to receive is reduced. 10 U.S.C. § 1451(a). Payment of the maximum annuity allowed will exclude all Sociay Security payments to the widow. But Social Security payments to the ex-spouse are not affected by the annuity payment to the widow, and the annuity payment to the widow is not reduced by Social Security payments to the ex-spouse. The annuity program is funded only in part through deductions from Army retired pay; a large proportion is funded through annual federal appropriations.[21.1]

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[21]The earlier plan is still in force for participants who chose to remain in it. 10 U.S.C. §§ 1431(b).

[21.1]*In re Marriage of Karlin*, 24 Cal.App.3d 25, 101 Cal.Rptr. 240 (1972); S.Rep. No. 1089, 92nd Cong., 2d Sess. 11 (1972); H.R. Rep. No. 481, 92nd Cong., 1st Sess. 8 (1971).

C. California Community Property Awards of Army Retired Pay to an Ex-Spouse.

The zeal with which California courts have attacked pension rights with community property weaponry is a fairly recent phenomenon. The forced development in this area has been undertaken by the California courts rather than by the legislature.[22] Statutory language which protected state created retirement benefits from claims of creditors was held no bar to the community property claim asserted by an ex-spouse as an owner.[23]

Early attacks on military retired pay as a form of allocable community property foundered on the concept of vested rights. Because the military benefits were not vested in a serviceman whose claim to retired pay had not yet matured, an early decision held that Army retired pay could not be allocated to an ex-spouse. *French v. French,* 17 Cal.2d 775, 112 P.2d 235 (1941). Subsequent decisions altered the theory of the matter. The right to retired pay was held to be a contingent property right subject to defeasance in the event the serviceman failed to complete the minimum service period. *Fithian v. Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied,* 419 U.S. 829 (1974).

The aggressive extension of community property concepts to the entire area of retirement benefits has been explained in terms of "the desire to give the former wife

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[22]*Benson v. City of Los Angeles,* 60 Cal.2d 355, 33 Cal.Rptr. 257 (1963); *Waite v. Waite,* 6 Cal.3d 461, 99 Cal.Rptr. 325 (1972); *Bensing v. Bensing,* 25 Cal.App.3d 889, 102 Cal.Rptr. 255 (1972); *In re Marriage of Brown,* 27 Cal.App.3d 188, 103 Cal.Rptr. 510 (1972); *Fithian v. Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974).

[23]See, *Phillipson v. Board of Administration,* 3 Cal.3d 32, 40 Cal. Rptr. 61 (1970) (bypassing Cal. Gov't Code §§ 21201, 21201.5).

some support."[24] Until 1975, the retirement income of any public servant (state or federal) could not be reached by execution to enforce a support award. Such retirement benefits were exempted from execution by state law.[25] The exemption statute would not permit support payments to be garnisheed.[26] In an end run, the courts "bypassed the exemption from execution by declaring the property as community and that the ex-wife is not a 'creditor' but an 'owner' reclaiming her own property."[27]

This approach required that the retirement funds of the public servant be characterized as deferred compensation for completed services. If the retired pay represented current wages for current services, community property principles, would provide no aid.[28]

In 1975, the state legislature excepted support orders from the exemption of retirement funds from execution.[29] At the same time, in the Social Services Amendments of 1974, the Congress consented to suits against the United States to enforce state support awards. 42 U.S.C. § 659(a). The new federal enactment covered "members of the

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[24]Goldberg, *"Is Armed Services Retired Pay Really Community Property?"* 48 Cal. State Bar J. 12, 89-90 (1973).

[25]Cal. Civ. Proc. Code § 690.18(a) (West, Supp. 1975); *Phillipson v. Board of Administration*, 3 Cal.3d 32, 40 Cal.Rptr. 61 (1970).

[26]*Ogle v. Heim*, 69 Cal.2d 7, 69 Cal.Rptr. 579 (1968).

[27]*Waite v. Waite*, 6 Cal.3d 461, 474, 99 Cal.Rptr. 325 (1972); *Phillipson v. Board of Administration*, 3 Cal.3d 32, 50, 40 Cal.Rptr. 61 (1970); *Wissner v. Wissner*, 338 U.S. 655, 660, n.4 (1949); Goldberg, *supra*, note 24.

[28]Wages are the separate property of the retiree after divorce. Separate property cannot be apportioned. Cal. Civ. Code §§ 4800, 5118, 5119 (West. Supp. 1980).

[29]Cal. Civ. Proc. Code § 690.18(a), as amended by 1975 Cal. Stats. 1035, ch. 590, § 2 (adding phrase, "Except with regard to court-ordered child or spousal support payments . . .").

armed services." A later, clarifying amendment in the Tax Reduction and Simplification Act of 1977, which appeared as 42 U.S.C. § 662(c), stated that the consent was limited to support payments. Property awards were expressly excluded.

As a result of these extraordinary changes[30] in state and federal law, the cause which prompted an assault by California courts on retirement benefits for public service employees lost its urgency. At present, support orders can easily be enforced against the United States; community property awards cannot.[31] But the doctrinal genie has been let loose; having established the theoretical basis for allocating retired Army pay, the state courts cannot now put the genie back in the bottle.[32]

With the initiative coming from the community property states, Congress in 1978 amended legislation governing the retirement program for the Federal Civil Service; it modified anti-assignment and sovereign immunity restrictions to allow garnishment of benefits to enforce community property awards.[33] More recently, similar action was taken to amend the retirement program affecting the Foreign Ser-

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[30]In a prior, unsuccessful legislative effort to bring about such changes, a House Committee observed that the proposal represented "a drastic departure from anything we have had in the past." H.R. Rep. No. 481, 92nd Cong., 1st Sess. 18 (1971).

[31]57 Comp.Gen. 420 (1978); 44 Comp.Gen. 86 (1964); *Marin v. Hatfield,* 546 F.2d 1230 (5th Cir. 1977). The ex-spouse need not chase down the retiree in another state or seek a contempt order. She need only bring a garnishment action against the appropriate agency's financial officer in state court.

[32]The implications of dealing with Army retired pay as divisible community property are only slowly emerging. California courts have not yet dealt squarely with these implications. See pp. 31-35, *infra.*

[33]5 U.S.C. § 8345(j)(1).

vice.[34] But a bill which would have modified legislation governing military retirement benefits by giving effect to state community property awards died in committee.[35]

II

BY MEANS OF ANTI-ASSIGNMENT STATUTES APPLICABLE TO ARMY RETIRED PAY, THE CONGRESS INTENDED THAT RETIRED PAY NOT BE DIVERTED FROM THE ENTITLED MEMBER

A. The Congress Enacted 37 U.S.C. §§ 701(a) and (c) to Protect Army Retired Pay.

Army pay anti-assignment statutes are of venerable age. Title 37 U.S.C. § 701(c) is traceable to an enactment in 1972. In its current formulation, the statute provides that "an enlisted member of the Army . . . may not assign his pay, and if he does so, the assignment is void.[36] Under § 701(c) "a commissioned officer of the Army . . . may transfer or assign his pay account, when due and payable"; but he may do so only "under regulations prescribed by the Secretary of the Army." Regulations contemporaneous with the enactment of § 701(a) limit the assignment of

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[34]Foreign Service Act of 1980, September 29, 1980, Pub. L. No. 96-465, § 820(b), ... Stat. ... (1980) (to be known as 22 U.S.C. § 1104).

[35]Hearings were held in May 1980 before the House Armed Services Committee on H.R. 2817. In testimony before the Committee Rep. Schroeder, sponsor of the bill, stated with respect to military pay: "Under current law a divorced spouse is prohibited from receipt of retirement or survivor's benefits. . .". Statement submitted on May 28, 1980. (The text of the Hearings are shortly to be published. A copy of the statement presented to the Committee is available at present from the office of Rep. Schroeder.)

[36]The original 1792 statute, enacted May 8, 1792, ch. 37, § 4, 1 Stat. 280, provides "[t]hat no assignment of pay made after the first day of June next, by a noncommissioned officer or private, shall be valid."

pay by a commissioned officer, when due and payable, to members of his "family."[37]

Although §§ 701(a) and (c) refer only to "pay," the sections apply to both active and retired Army pay.[38]

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[37]The predecessor to § 701(a) appeared in the Act of March 2, 1907, ch. 2511, 34 Stat. 1159. That Act stated in a proviso, "[t]hat hereafter all commissioned officers of the Army may transfer or assign their pay accounts, when due and payable, under such regulations and restrictions as the Secretary of War may prescribe." Prior to this enactment, the matter was governed only by Army regulations. See, Act of April 23, 1904, ch. 1485, 33 Stat. 266. The regulations referred to in the 1907 legislation appear as Article LXXVI in *Regulations for the Army of the United States* (Washington, Government Printing Office, 1908), published under authority of the Secretary of War, and distributed to all officers by the Paymaster General. Section 1277, which appears at page 217, states in pertinent part:

> An officer may forward his pay account to a paymaster before maturity, the amount to be remitted to the officer when due, or placed to his credit with a bank if the account is still endorsed, but an officer will not hypothecate or transfer an account not actually due. * * * A transferred account will not be paid outside the department in which the officer is regularly paid except when it is transferred for the benefit of his family residing in another department,
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> . . .

[38]Section 1-17 of Army Regulation No. 37-104-1, issued by Headquarters, Department of the Army, Washington, D.C., July 1, 1977, and pertaining to "financial administration, payment of retired pay to members and former members of the Army", provides:

> "(a) *Commissioned Officers*—A retired officer may transfer or assign retired pay when due and payable. (37 U.S.C. § 701(a)).
>
> "(b) *Enlisted Members*—An enlisted member is not authorized to assign retired pay and, if done, the assignment is void. (37 U.S.C. § 701(c))."

Section 701 must apply to retired pay, since historically Army retired pay was viewed as pay for the current year—payment in reduced amount for reduced services. *United States v. Tyler*, 105

B. Sections 701(a) and (c) Promote Important Federal Objectives.

The Congress has sought to protect both the enlisted man and the commissioned officer from their own follies and from the depredations and claims of others. In § 701(c), the Congress ensured that the enlisted man would not become demoralized, because he was expected to work and fight without pay. By making his assignments "void", the prohibition permits no quibbling.

The limitations placed by § 701(a) on the right of an Army commissioned officer to assign his pay are no less rigorous. "When due and payable" is simply an alternative phrasing for the prohibition against "anticipation" considered in *Hisquierdo*.[39]

Sections 701(a) and (c) derive from settled rules based upon public policy considerations: an assignment by a public officer of the unearned salary of his office is void. *Fisher v. Liberty National Bank & Trust Co.*, 61 F.2d 757, 758

U.S. 244 (1881). Currently, "[t]he officers of the United States who are entrusted with the administration of pay and allowances for the United States Army consider retirement pay and active duty pay to be the same, and that they are identical and to be considered the same." *Watson v. Watson*, 424 F.Supp. 866, 869 (E.D.N.C. 1976). Army retired pay had traditionally been tied directly to active duty pay by a formula that adjusted retired pay as active duty pay rose or fell. *Costello v. United States*, 587 F.2d 424 (9th Cir. 1978), *cert. denied* 442 U.S. 929 (1979). After 1963, this linkage was broken, and Army retired pay was tied to a cost-of-living index. Because of these characteristics associated with Army retired pay, there was no need for the Congress to have adopted two anti-assignment statutes, one for active-duty pay and another for Army retired pay.

[39] *United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968); *Smith v. Commanding Officer, Air Force Accounting*, 552 F.2d 234, 235 (9th Cir. 1979); *In re Marriage of Ellis*, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd* 191 Colo. 317, 552 P.2d 506 (1976).

(2d Cir. 1932), *cert. denied sub nom. Barker v. Fisher*, 288 U.S. 611 (1933).[40]

Anti-assignment statutes serve the need for uniformity in the treatment of retired pay.[41] The railroad man in *Hisquierdo* and the federal civil servant both have a choice where to live. Both *choose* to live in California. But the Army man on active duty will be *ordered* to California. The Army cannot send its soldiers and officers to California under threat of compulsion[42] without insulating them from the inroads of local divorce courts that promote local public policy concerns at the expense of the servicemens' future retired pay.[43]

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[40]"By an assignment of his future pay a public officer strips himself of further inducement to perform his services and thus chills his efforts." 61 F.2d at 759. This rule applies to the pay of an Army officer; and it applies of its own force without need for an express statutory prohibition. *United States v. Phillips*, 5 App.D.C. 385, 389 (1895). Cf., *Lockhart v. Mittleman*, 123 F.2d 703, 704 (2d Cir. 1942).

[41]"Section 231m plays a most important role in the statutory scheme. Like anti-attachment provisions generally [citations omitted], it ensures that the benefits actually reach the beneficiary. It preempts all state law that stands in its way. * * * It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of Congressional policy." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583-84.

[42]If he "fails to go to his appointed place of duty" he "shall be punished." 10 U.S.C. § 886.

[43]The Husband in this case performed duty in Oregon, Washington, D.C., Texas, Hawaii, and Pennsylvania (J.A. 32) without anticipating that the Army might send him in the future to California. In California, the Husband found himself before a divorce court that did not limit itself to dividing that portion of his retired pay attributable at time spent in an Army base in California. The court concerned itself with the Husband's entire 20-year service period as the basis for its award. *Cf., Fithian v. Fithian*, 10 Cal.3d

The serviceman with significant credit time towards Army retired pay should fear a move to California. If his service credit was acquired outside community property states, his expectation of receiving retired pay, at a decent level which may allow him freedom from penury, may not be realized.[44]

The non-army spouse contemplating divorce is immediately benefited by moving to California from a non-community property state. Relocation by the Army immediately invests the non-Army spouse with a right to a significant asset that she never had before. This uncertainty on the part of Army members—whether a divorce court will strip them of their right to retired pay—serves

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592, 111 Cal.Rptr. 359 (1974); *In re Anderson*, 64 Cal.App.3d 36, 134 Cal.Rptr. 252 (1976). Domicile considerations do not deter the California courts. Merely filing for divorce in California was deemed sufficient for the Husband to have waived any defense he may have had based upon his claimed Oregon domicile. J.S. 52-54. But the Husband had no choice: he had to file in California to secure custody of his minor children in California.

[44]Because the ex-spouse claims her share as an owner, the divorce court does not take into account limitations on sums which may be garnisheed as wages. Neither state limitations on the garnishment of wages, nor limitations set forth in the Consumer Credit Protection Act, 15 U.S.C. § 1673(b) (as implemented in regulations appearing in 5 C.F.R. Part 581) apply to an ex-spouse claiming her "property" in Army retired pay. Moreover, the former member must pay income tax on the entire sum of his retired pay; if the portion which he pays to the ex-spouse is her "property," he has no alimony deductions.

If the former member participates in the Survivor Benefit Plan (to assure the college education of his children or to provide for a surviving second spouse), his contributions to the Plan reduce only *his* portion of the retired pay. If he keeps the children, as here (J.A. 44), but does not secure a support award in his favor, the ex-spouse's share in retired pay is not diminished. If he must also, as here (J.A. 44), make support payments to the ex-spouse, such payments will again come out of his share of Army retired pay.

as a disincentive to join the Army or to remain in it. The flow of incentives which the Congress built into the system is thus significantly impaired by state community property initiatives in the context of divorce.[44.1]

C. The Congress Did Not Intend That §§ 701(a) and (c) Be Understood as Mere Expressions of Sovereign Immunity Against Suit in Garnishment Proceedings.

Hisquierdo reaffirmed "the settled view that anti-assignment statutes have substantive meaning." 439 U.S. 572, 586. It is significant, the court noted, that the statute makes no exception for a spouse.

Sections 701(a) and (c) reach beyond the sovereign immunity concerns of the United States. The early origins of 701(c) predates any statutory expression of sovereign immunity, such as that found at 31 U.S.C. § 203 or 41 U.S.C. § 15. The 1907 formulation of § 701(c) long post-dates the holding by this Court that Army retired pay cannot be garnisheed.[45]

The Congress has more recently adopted a strong anti-assignment provision for the Survivor Benefit Plan, 10 U.S.C. § 1440. There would be no need for separate anti-assignment restrictions for each category of Army retirement benefits if the only purpose of such legislation was to protect the Government against the inconveniences of

[44.1] To be sure, some jobs in the Army may be pursued on the basis of applications made for them by military personnel. The element of forum shopping will become paramount, however, to Army members aware of the risk to their retired pay associated with state community property laws. California will definitely be less attractive to a soldier than a common-law state if the serviceman fears that by transferring to California he endangers his retired pay.

The non-member spouse, contemplating divorce will surely forum-shop for a transfer to a community property state so as to claim her property interest in her husband's retired pay.

[45] *Alexander v. Buchanan*, 45 U.S. (1 How.) 20 (1846).

garnishment. The sovereign immunity of the United States from suit without its consent requires no anti-assignment provision to preserve its vitality.

Post-*Hisquierdo* California decisions dealing with military retired pay have drawn subtle distinctions among anti-assignment statutes.[46] But it is not the wording of any retired pay anti-assignment statute that has concerned the California courts.[47] In a candid admission, the State high court explained that in considering the scope of anti-assignment statutes it was bound by community property concerns.[48] This Court, however, is not similarly burdened.

California courts overcome all statutory construction difficulties posed by anti-assignment limitations. They simply apply California, rather than federal, characterizations of the nature of the right created by the Congress; they apply state ownership principles to the federal retirement benefit; and they demean the anti-assignment provisions which attend the federal benefit as mere expressions of sovereign immunity.

There is no basis for so emasculating § 701.

D. Sections 701(a) and (c) Do Not Allow California to Apply Its Community Property Principles to Award an Ex-Spouse an Allocable Share in Army Retired Pay.

The attempt by the wife to by-pass § 701 by reference to her property rights in the Husband's Army retired pay

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[46]*Gorman v. Gorman*, 90 Cal.App.3d 454, 153 Cal.Rptr. 479 (1979); *In re Marriage of Milhan*, 27 Cal.3d 765, 166 Cal.Rptr. 533 (1980).

[47]In *Hisquierdo* the California Supreme Court was not impeded by the bar against anticipation. *In Re Marriage of Hisquierdo*, 19 Cal.3d 613, 139 Cal.Rptr. 590 (1977).

[48]*Phillipson v. Board of Administration*, 3 Cal.3d 32, 68 n.10 and 69 n.12, 89 Cal.Rptr. 61 (1970).

proves too much. If the Wife has a true property interest, the implications exceed by far the issues involved in this case. An explanation of these implications serves to discredit the ownership argument:

(1) If the Wife is an owner of a property interest in Army retired pay she has as much of an entitlement to retired pay, for as long as *she* lives, as the Husband has for as long as *he* lives. Ownership by the Wife implies that the Army must pay her retired pay, for her efforts in the partnership venture by which the Husband, as the representative of the community, completed the requisite service period.[49] To be sure, the Survivor's Benefit Plan, 10 U.S.C. §§ 1447-1455, which provides for an annuity to a surviving spouse, would become redundant if a spouse could also collect retired pay, as a matter of her own property right, for as long as she lives.

(2) As a part owner of Army retired pay, the ex-spouse should be able to prevent the Army member from making decisions which would damage her ownership rights.[50] If after 19 years of service the Army member wishes to resign from the service, his resignation will affect the property interest of his ex-spouse in his retired pay. The resignation will, in fact, destroy it. Continued service by an Army member after the 20-year term also affects an ex-

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[49]The fiscal impact associated with acceptance of this doctrine would be substantial. Military retirement benefits account for half of total military personnel costs. *House Armed Services Committee Rep. No. 95-85. Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Armed Services Committee*, 95th Cong., 1st & 2d Sess. 5 (1977-1978).

[50]Under § 5125(b) of the Cal. Civ. Code, neither member of the community may "dispose of community personal property without a valuable consideration, without the written consent of the other spouse."

spouse's property interest. As long as the member continues in the Army, there are no monthly retired pay checks current to divide. There are only checks for office wages.

To defend destruction of her interest, the ex-spouse should be entitled—as in any analogous property preservation dispute—to enjoin the Army member from resigning prior to his completion of the 20-year period for eligibility; in the alternative, she should be able to secure damages from the Army member if he willfully chooses to resign from the Army prior to completing the 20-year service period.[51]

It would certainly be anomalous to have California courts intervene in this manner in the operation of the personnel system of the Army.[52]

(3) If Army retired pay is property, the ex-spouse who pre-deceases the retired member should be able to transfer her property by testamentary disposition. After all, all other property which an ex-spouse acquires by way of division of community property at the time of divorce can be freely disposed of by her, without limitation. California courts achieve this result routinely when the ex-spouse takes her share in the husband's retired pay from unrelated community property. If the Army member then fails to live out his expected lifespan, the ex-spouse is that much better off for having taken offsetting tangible property.

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[51]The same argument applies with respect to the Army spouse or ex-spouse who refuses to resign from the Army after 20 years. The non-Army spouse or ex-spouse should be able under state law to compel him to resign so that she can enjoy her property interest.

[52]The point can be expanded to include creditors' rights. If the wife pledges her property interest in the husband's Army retired pay, she may default and the lender, a financial institution, will acquire her property interest in the Army member's retired pay entitlement. The creditor then should have the same rights as the ex-spouse to force the Army member to resign or not to resign.

If there is no offsetting tangible community property, California courts restrict the ex-spouse from disposing of her share of the retired pay by testamentary disposition. But because the justification for the restriction so lacks adequate legal support, either the restrictions or the application of property concepts to Army retired pay must give way.[53]

The image of the former member hardly getting by, while the heirs (or creditors) of his ex-spouse draw half his retired pay shows the absurdity of applying community property principles to Army retired pay.[54]

(4) Community property awards of Army retired pay propel Army retirees to take advantage of the federal bankruptcy law. If the retired pay benefits are actuarially valued and the ex-spouse awarded an offsetting sum, she

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[53]*Waite v. Waite*, 6 Cal.3d 461, 99 Cal.Rptr. 325 (1972) held that the California legislature had intended to limit an ex-spouse's interest in the state-created pension of her husband to the duration of her lifetime, even if she predeceased him. That decision was then extended in *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974), *without analysis*, to Army retired pay. Although the Congress can preempt California's application of its community property regime to Army retired pay, it cannot create a new species of property under hitherto unknown state law.

In the present case the Wife's interest in husband's retired pay is to last "as long as she lives." (J.A. 45). But so flawed is the reasoning supporting such a limitation that the courts or the legislature may seek to change the rule. Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After* Marriage of Brown *and ERISA*, 25 U.C.L.A. L.Rev. 417, 443-482 (1978).

[54]"It certainly mongrelizes recognized property law concepts to say that upon her death that property right terminates in order to avoid a result which would point up the obvious inconsistencies with the congressional intent in establishing military retirement pay." *Ramsey v. Ramsey*, 96 Idaho 672, 684, 535 P.2d 53, 65 (1975) (dissent).

may well take all the tangible property available.[55] The former member may end up marching from the divorce court straight to the federal courthouse. The Bankruptcy Act at 11 U.S.C. § 523(a)(5) does not acknowledge a special status for a spouse claiming as a community property owner. An ex-spouse, armed with a community property award, is a creditor within the meaning of the Act.[56] A uniform system of dealing with Army retired pay, consistent with the national objective of promoting a strong military cannot be realized if Army personnel must resort to bankruptcy for relief from community property awards depriving them of Army retired pay.

E. Legislative history supports the conclusion that Congress intended that Army retired pay not be diverted from the former member

The statutory and legislative materials provide no indication that the Congress intended to allow enforcement of state community property awards against Army retired pay.

The Social Security Act amendments of 1975 and 1977 (42 U.S.C. §§ 659 and 662(c)) point to an opposite result. The specific changes affecting the Civil Service and the Foreign Service,[56.1] show a careful selection by the Congress of the objects of its attention. If express amendments to

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[55]In Idaho, if there is inadequate tangible property, the former member will be required to buy out the interest of his ex-spouse in his retired pay within a specified period and with his future earnings. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

[56]Her claim is exempt from discharge if she is pursuing a support award. *Norris v. Norris*, 324 F.2d 826 (9th Cir. 1963). She is an ordinary creditor if she is pursuing recovery of a community property award. *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975).

[56.1](5 USC 8345 (j)(1) (Supp. 1980); Foreign Service Act of 1950, September 29, 1980, Pub. L. No. 96-465, § 820(b), .. Stat. .. (1980) to be collated as 22 USC § 1104).

these two retirement programs were necessary to subject two kinds of federal retirement programs to the vagaries of community property awards, an express statutory amendment must also be necessary to bring about the same result for Army retired pay. This is especially so in light of §§ 701(a) and (c).

A Senate Committee has described retired pay as a "personal entitlement" of the former member.[57] In considering the balance between retired pay and the annuity programs, funded in part by deductions from retired pay, a House Committee noted that "[t]he rights in retirement pay accrue to the retiree and, ultimately, the decision is his as to whether or not to leave part of this retirement as an annuity to his survivors".[58]

The legislative history directly discussing Army retired pay is sparse. However, "[o]ne searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." *Cose v. Cose*, 582 P.2d 1230, 1232 (Alaska 1979), *Cert. petition docketed,* 48 U.S.L.W. 3627 (Alaska 1980).

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[57]"Historically, military retired pay has been a personal entitlement payable to the member himself as long as he lives." S.Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300.

[58]H.R.Rep. No. 481, 92d Cong., 1st Sess. 9 (1971).

III

IN ARMY RETIRED PAY, THE CONGRESS ALLOWS THE FORMER MEMBER CURRENT PAY ON A REDUCED BASIS FOR REDUCED SERVICES, BASED PRIMARILY UPON HIS VULNERABILITY TO RECALL TO ACTIVE SERVICE. SUCH CURRENT PAY CANNOT BE DIVERTED BY CALIFORNIA'S DIVORCE COURTS

California has applied its own law to characterize Army retired pay as a pension given by the Army as compensation to a former member for past services.[59]

If federal law characterized Army retired pay as divisible property, California courts could look to community property law as to how to divide such property.[60] But federal law does not so characterize it. On the contrary, Army retired pay has none of the usual incidents associated with divisible property.[61]

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[59]California decisions do not distinguish between pensions, retirement and retired or retainer pay. Even where Army retired pay or Navy retainer pay is concerned, California courts loosely refer to them as pensions. *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974); *In re Marriage of Milhan*, 27 Cal.3d 765 (1980).

Pensions represent a gratuity for past services performed. *Andrews v. United States*, 175 Ct.Cl. 561, 562-63 (1966); *Lemly v. United States*, 109 Ct.Cl. 760, 75 F.Supp. 248 (1948); *Cf. United States v. Larionoff*, 431 U.S. 864, 878 (1977). "Retirement" pay sometimes refers to retainer pay. The current terms for the pay of former members of regular components of the Army is "retired pay;" for the Navy it is "retainer pay." 10 U.S.C. § 1401(a).

[60]*Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964); *Free v. Bland*, 369 U.S. 663, 666 (1962); *McCune v. Essig*, 199 U.S. 382, 387-390 (1905).

[61]It has no loan or redemption value and cannot be passed on by the former member by testamentary disposition. *U.S. v. Williams*, 279 Md.App. 673, 370 A.2d 1134 (1977); *Savage v. Savage*,

For over 100 years Army retired pay has been recognized as a continuation of active duty pay—in the nature of reduced pay for reduced services.[62] This characterization is so well anchored that it is unthinkable that the Congress

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374 N.E.2d 536 (Ind. 1978); *Baker v. Baker,* 546 P.2d 1325 (Okla. 1976).

Army retired pay is not protected by the fifth amendment against abolition or reduction by the Congress. *Costello v. United States,* 587 F.2d 424 (9th Cir. 1978). The Congress has in fact reduced retired pay by formula in the Dual Compensation Act, 5 U.S.C. § 5532. That reduction has withstood constitutional challenge on fifth amendment grounds, *Puglisi v. United States,* 564 F.2d 403 (Ct.Cl. 1977), *cert. denied* 435 U.S. 968 (1978); *Cf.* 59 Comp. Gen. . . . (B-196825 and B-183828, May 20, 1980).

[62]The principal was first stated in *United States v. Tyler,* 105 U.S. 244, 26 L. Ed. 985 (1881) that "Compensation is continued at a reduced rate, and the connection is continued, with the retirement from active service only." The court added the following:

> "It is impossible to hold that men who are by statute declared to be a part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service."
>
> "If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States." 105 U.S. at 246.

One hundred years later, the characterization of Army retired pay is the same. In *Costello v. United States,* 587 F.2d 424, 427 (9th Cir. 1978), *cert. denied* 442 U.S. 929 (1979), the same point is made: "[R]etirement pay does not differ from active duty pay in its character as pay for continuing military service."

has ever conceived of Army retired pay in any other fashion.[63]

The primary modern justification for this characterization lies in the vulnerability of the military retiree to recall to active duty.[64] But there are other justifications as well.[65]

California errs in believing itself free to apply state law to characterize the federally created right. State law will find divisible property even where the Congress has created a non-divisible right, so recognized from time immemorial by the federal courts. If federal law applies—

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[63]The federal cases are uniform and legion in describing retired pay as reduced pay for reduced services. *Kahn v. Anderson,* 255 U.S. 1 (1920); *United States v. Morton,* 112 U.S. 1 (1884); *United States v. Mills,* 197 U.S. 223 (1904); *Leonard v. United States,* 279 U.S. 40 (1928); *Puglisi v. United States,* 564 F.2d 403 (Ct.Cl. 1977), *cert denied;* 435 U.S. 968 (1978); *Lockhart v. Mittlemann,* 123 F.2d 703 (2d Cir. 1941); *Lemly v. United States,* 75 F.Supp. 248 (Ct.Cl. 1948); *A. L. Abbott v. United States,* 200 Ct.Cl. 384 (1973); *Andrews v. United States,* 175 Ct.Cl. 561 (1966); *Watson v. Watson,* 424 F.Supp. 866 (E.D. N.C. 1976); *Chambers v. Russell,* 192 F.Supp. 425 (N.D. Cal. 1961); *Hooper v. Hartman,* 163 F.Supp. 437 (S.D. Cal. 1958), affirmed 274 F.2d 429 (9th Cir. 1959); *Jones v. United States,* 185 F.Supp. 347 (E.D. N.Y. 1960); *Hoeppel v. Westover,* 79 F.Supp. 794 (S.D. Cal. 1948).

Many state cases reach the same result. *United States v. Williams,* 279 Md.App. 673, 370 A.2d 1134 (1977); *J. M. Court v. Commonwealth,* 207 Va. 556, 151 S.E. 2d 384 (1966); *Elmwood v. Elmwood,* 295 N.C. 168, 244 S.E. 2d 668 (1978); *Harris v. Harris,* 40 N.C. App. 26, 252 S.E. 2d 95 (1979). See also, 43 Comp. Gen. 785 (1964); and 41 Comp. Gen. 715 (1962).

[64]The recall statutes are overlapping and numerous. See 10 U.S.C. § 3504(a) (for Army and Air Force); 10 U.S.C. § 675 (ordering to active duty retired reservists without their consent); 14 U.S.C. § 331 (ordering any retired officer to active duty); and 10 U.S.C. § 8504 (recall of retired Regular Air Force members). *Cf.* 41 Comp. Gen. 715, 717 (1962).

[65]See text at footnotes 11 through 18.

—as it clearly does—to define the nature of Army retired pay, the result, without question, will defeat community property division. Army retired pay is current wages and as such is not divisible after divorce.

IV

DIVORCE COURT AWARDS BASED ON COMMUNITY PROPERTY CONCEPTS INTERFERE IMPERMISSIBLY WITH THE FEDERAL SYSTEM OF CAREFULLY BALANCED BENEFITS FOR THE FORMER MEMBER RECEIVING ARMY RETIRED PAY, HIS SPOUSE, EX-SPOUSE, AND WIDOW

In *Hisquierdo*, the court noted that in the Railroad Retirement Act the Congress had provided benefits to a worker's spouse. These benefits terminated, however, when the spouse and the employee were absolutely divorced. 439 U.S. at 575. In a further observation the Court noted that "[T]he burden of marital dissolution may be particularly onerous for a spouse who, unlike respondent, has no expectation of receiving his or her own social security benefits." 439 U.S. at 590. The Court also took note that the Congressional decision to cut off a spouse after a divorce was a deliberate choice. 439 U.S. at 590.

The package of retirement benefits selected by the Congress for the military retiree ties into the Social Security System and protects the retired member, his spouse, widow and ex-spouse. While in active service, the Army member contributes to the Social Security scheme by means of involuntary deductions from pay. Benefits to the spouse and to the ex-spouse inhere solely by virtue of his contributions; the non-Army spouse is not required to make any contributions of her own to the system. Unlike benefits under the Railroad Retirement scheme, the ex-spouse here receives a benefit in her own right. 42 U.S.C. § 402(b). The ex-spouse who takes half the Army retired pay under

a community property division has thus already been provided for by the Congress through the Social Security System.[66]

The widow is also protected by Social Security. She has, however, a favored status over the ex-spouse as an eligible beneficiary under the annuity program. The serviceman can provide for his surviving spouse through contributions deducted from his retired pay. In both the Retired Serviceman's Family Protection Plan and in the Survivor's Benefit Plan, the Congress has chosen to protect only the "widow", (i.e., a woman who survives as his wife)[67] and the "surviving spouse."[67.1]

The choice was deliberate. It can be seen from the 1968 amendment to the Retired Serviceman's Family Protection Plan, 10 U.S.C. § 1434(c), which bars further deductions from retired pay when the spouse can no longer be a beneficiary. This was done "[t]o safeguard the participant's future retired pay when . . . a divorce occurs."[68] Provisions for protection of ex-wives were stricken by the Senate, after the House version had initially adopted them.[68.1]

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[66]The Congress has provided for her even though it has provided no Social Security benefits for the spouse of the member in the Federal Civil or Foreign Service. Neither of those programs is tied into Social Security. 42 U.S.C. § 410(a)(6)(A).

[67]10 U.S.C. §§ 1447(3), 1450(a); 10 U.S.C. §§ 1434, 1435; 32 C.F.R. § 48.303.

[67.1]10 U.S.C. §§ 1434(a) and (d).

[68]Statement by the Department of Defense which insisted upon this amendment. S.Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300.

[68.1]118 Cong. Rec. H-8255 (daily ed. Dec. 8, 1975); *Goldberg, supra,* note 24, at 89.

The Congressional scheme observable in the annuity programs is simply not compatible with community property awards of Army retired pay:

(1) The former member is compelled by State law to share retired pay with an ex-wife whom Congress deliberately rendered ineligible for voluntary coverage.

(2) Under the Survivor Benefit Plan, the annuity to the widow is terminated upon her remarriage. 10 U.S.C. § 1450. But the ex-spouse is not subject to any such limitation. She takes retired pay from unrelated tangible property, and uses that property as she wishes or, she may take an allocable share of the monthly retired pay received by the retiree and may remarry without terminating her benefits. "Thus one is forced to conclude either that the objects of Congress' bounty are to be treated worse than those it neglected, or, perhaps more logically that those it neglected have no community property rights."[69]

(3) Since the contributions to each of the annuity programs are made from retired pay, it should follow that if retired pay is in fact community property the ex-spouse should have an interest in the annuity itself.[70] This has been the result in community property states with respect to insurance benefits.[71] The ex-spouse would, if permitted by federal law, take a portion of both the retired pay and the annuity.

But the Congress devised the benefit program to care for the widow—not for the ex-spouse. It intended retired pay to care for the Army retiree. If the ex-spouse takes only a

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[69]*Goldberg, id.*

[70]It is a feature of community property law that "property purchased with community property retains a community character" *Free v. Bland*, 369 U.S. 663, 664 (1962).

[71]See *Wissner v. Wissner*, 338 U.S. 655, 659 (1949).

portion of the retired pay, she is already preferred to the widow with an annuity. The widow's annuity will be reduced by the Social Security offset. 10 U.S.C. § 1451. But the ex-spouse's share in the retired pay is not reduced by an offset attributable to her Social Security benefits, since the offset applies only to the annuity.

(4) The annuity programs are part of a consistent Congressional pattern. Death benefits are awarded only to a surviving spouse and not to an ex-spouse. 10 U.S.C. § 1447(3). Benefits provided as Disability and Indemnity Compensation are also routed only to a surviving spouse. 38 U.S.C. § 410(a).

(5) Accrued but unpaid arrearages in Army retired pay pass by a mode of testamentary disposition allowed by federal law. 10 U.S.C. § 2771. The serviceman's right of testamentary disposition, granted to him by the Congress, cannot be undermined by allowing a state right of recovery, under community property principles, by an ex-spouse from the serviceman's designated beneficiary.[72] The claim by an ex-spouse for an allocable share of Army retired pay is simply repugnant to the Congressional dictate, informed by legislative history, that the serviceman shall have the freedom to choose his designated beneficiary in such accrued but unpaid retired pay.[73] It cannot be that the Congress intended one result for Army retired pay accrued but unpaid at the time of death and another result for all other retired pay.

(6) When an ex-spouse takes half the monthly retired pay, there is a positive disincentive on the former member to participate in the annuity program to benefit his children

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[72] *Cf. Wissner v. Wissner*, 338 U.S. 655, 659 (1949) and *Free v. Bland*, 369 U.S. 663, 669 (1962).

[73] *See* H.R. Rep. No. 833, 84th Cong., 2d Sess. (1955), *reprinted in* [1955] U.S. Code Cong. & Ad. News 2434, 2435, 2438.

or new spouse. The Congress has modified the annuity program to make it more attractive to the retiree.[74] Community property awards of Army retired pay may so reduce the amount remaining of retired pay that the retiree must pay a much higher proportion of his remaining share to secure the benefits of the annuity plan.

The delicate balance among the statutory programs which bear upon the Army retiree does not allow a one-track state initiative concerned only with equal division of property at the time of divorce. The State's preference for a distinct social policy is repugnant to federal statutory pattern, its underlying purposes, and to the balance struck by the Congress in fashioning benefits and remunerations suitable for the achievement of national objectives.

V

THE CONGRESS HAS RECOGNIZED THE RIGHT OF THE SPOUSE TO INVADE ARMY RETIRED PAY BASED UPON HER NEED; BUT IT HAS NOT RECOGNIZED HER RIGHT TO DO SO BASED UPON HER PROPERTY INTEREST IN SUCH PAY

In the 1975 Social Security Amendments, 42 U.S.C. § 659(a) (as clarified in 1977 by 42 U.S.C. § 662(c)), the Congress adopted a policy preference for enforcing support obligations created by state court awards. The provisions accord no special status to community property awards. The same set of policy preferences have been set in place in the Federal Bankruptcy Act. 11 U.S.C. § 523(a) (5).

Community property states are few in number. The majority of the states are concerned with equitable division

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[74]The program as originally established was actuarially sound and hence quite expensive. It has been modified so that the contributions from retired pay account are roughly half of sums needed to pay benefits. *See Goldberg, supra,* note 24, at 17.

of property at the time of divorce, with alimony, and with child support. To this end, most states have enacted the Uniform Reciprocal Enforcement of Support Act, as has California.[75] It is understandable, in these circumstances, that the Congress would proceed with caution before accommodating the social policy preferences of a minority of states in matters affecting military retired pay.

It is far from clear that, as social policy, an equal division of Army retired pay would represent wise social policy. The Congress has no doubt taken the following considerations into account in modifying §§ 701(a) and (c) only for support payments:

(1) Invading retired pay to enforce a support order represents only a temporary invasion of the retired pay of the former member. Dependent children become adults and end their dependency; the ex-spouse marries, dies, or becomes financially independent.

An amount not based upon need, all too frequently creates inequality rather than equality. The ex-spouse marries and acquires a profitable arrangement; or dies; or becomes far more financially solvent than the former member. There is in these situations no undoing the original community property division of the retired pay.

(2) An ex-spouse can receive support from the former member's retired pay even when the state correctly characterizes retired pay as reduced wages for reduced services. Under such characterization, Army retired pay is the separate property of the former member after divorce. But separate property can be invaded to support an ex-spouse. Cal. Civ. Code § 4806. The divorce court will retain jurisdiction to review the matter from time to time as conditions change. (*Compare,* J.A. 44, lines 1-2; 59, lines 13-

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[75]Cal. Civ. Code §§ 5150 *et seq.*

24). This is surely preferable to pushing the retired member to seek relief in bankruptcy.

(3) Community property principles are not concerned with fault. California also has no-fault divorce. Civil Code § 4506. But a prospective award of alimony may be burdened with special considerations. Cal. Civ. Code § 5480(a)(9). If Army retired pay is current wages, the wife claims alimony and special considerations are relevant; if retired pay is divisible property, she claims an automatic equal share and special considerations are not relevant.[76]

(4) Army retired pay is so much the equivalent of wages, that acceptance of state awards based upon community property concepts may simply be too radical a step for the Congress to take. States following equitable division of property in divorce do not classify Army retirement pay as marital property, capable of division.[77] A congressional enactment allowing local option by the states to treat retired pay as community property would cause confusion as to the basic nature of Army retired pay. A policy choice, as represented in the Social Security enactments, favoring invasion of retired pay for support only, avoids that dilemma.

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[76]The wife in this case was awarded support (J.A. 44). The amount of support was less than the wife requested. Compare J.A. 44 with J.A. 15. The Superior Court Judge retained jurisdiction to consider circumstances as they might change, on the basis of need. (J.A. 44). The Superior Court Judge was aware of, and may well have considered, the causes for the "irremediable breakdown" (J.A. 53-54) of the marriage in establishing the amount of support. *See*, J.A. 40.

[77]*E.g.*, *United States v. Williams*, 279 Md. 673, 370 A.2d 1134 (1977); *Savage v. Savage*, 374 N.E.2d 536 (Ind. 1978); *Baker v. Baker*, 546 P.2d 1325 (Okla. 1976).

VI
CONCLUSION

As applied to the Husband in this case, California's quasi-community property scheme is repugnant to federal statutes which establish and protect Army retired pay as a personal entitlement of a former Army member. Property divisions of Army retired pay do great damage to important federal interests. These divisions undermine the flow of incentives established by the Congress in the retirement statutes. They conflict with the measured distribution of benefits which the Congress directed in interrelated legislation towards the former Army member, his ex-spouse, and his widow. They conflict impermissibly with Army-pay anti-assignment provisions, 37 U.S.C. §§ 701(a) and (c), which ensure that Army pay shall reach the serviceman without anticipation from the claims of creditors.

The summation by this Court in *Hisquierdo,* 439 U.S. 572, 590, applies here with equal force:

> [T]he community property interest that respondent seeks conflicts with [§§ 701(a) and (c)], promises to diminish that portion of the benefit Congress has said should go to the [former Army member] alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

The Court is requested to reverse the decision of the California Court of Appeal and to direct that Court to issue

an order allowing the Husband to retrieve and retain those funds which the Husband has deposited into a trust account out of his Army retired pay, pending resolution of all appeals, as the portion allocated to the Wife by the Court of Appeal.

Respectfully submitted,

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS

December 4, 1980

APPENDIX

Texts of Statutes Referred to in Memorandum:

Constitution of the United States, Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5 U.S.C. § 8345(j)(1) (Civil Service Retirement Act).

Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

5 U.S.C. § 5532 (Dual Compensation Act).

(a) For the purpose of this section, "period for which he receives pay" means the full calendar period for which a retired officer of a regular component of a uniformed service receives the pay of a position when employed on a full-time basis, but only the days for which he actually receives that pay when employed on a part-time or intermittent basis.

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive

the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(c)(1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired or retainer pay (reduced as provided under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule, such member's retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. The amounts of the reduction shall be deposited to the general fund of the Treasury of the United States.

(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period (reduced as provided under subsection (b) of this section), except that the amount of the reduction may not result in—

(A) the amount of retired or retainer pay allocable to the pay period after being reduced, when combined with the basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently paid for level V of the Executive Schedule; or

(B) the amount of retired pay or retainer pay being reduced to an amount less than the amount deducted from

the retired or retainer pay as a result of participation in any survivor's benefits in connection with the retired or retainer pay or veterans insurance programs.

10 U.S.C. § 227(a) (Final Settlement of Accounts: Deceased Members).

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

10 U.S.C. § 675 (Recall, Retired Person).

A member in the Retired Reserve may, if qualified, be ordered to active duty without his consent, but only as provided in section 672(a) of this title.

10 U.S.C. § 802 (Code of Military Justice, Persons Subject to).

The following persons are subject to this chapter:

* * * * *

(4) Retired members of a regular component of the armed forces who are entitled to pay.

10 U.S.C. § 886 (Absence Without Leave).

Any member of the armed forces who, without authority—

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

10 U.S.C. § 1335 (Recall to Inactive Status List).

(a) A person who would be eligible for retired pay under this chapter but for the fact that he is under 60 years of age may be transferred, at his request and by direction of the Secretary concerned, to such inactive status list as may be established for members of his armed force, other than members of a regular component.

(b) While on an inactive status list under subsection (a), a person is not required to participate in any training or other program prescribed for his component.

(c) The Secretary may at any time recall to active status a member who is on an inactive status list under subsection (a).

10 U.S.C. § 1434 (Kinds of Annuities that may be Elected).

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or

retainer pay, in no case less than $25. He may make the annuity payable—

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or, if the spouse remarries before age 60, when the spouse remarries;

(2) in equal shares to, or on behalf of, the surviving children eligible for the annuity at the time each payment is due, ending when there is no surviving eligible child; or

(3) to or on behalf of, the surviving spouse, and after the death of that spouse or the remarriage of that spouse before age 60, in equal shares to, or on behalf of, the surviving eligible children, ending when there is no surviving eligible child.

10 U.S.C. § 1440 (Annuities not Subject to Legal Process).

No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 1447 (Survivor Benefit Plan, Definitions).

(3) "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

10 U.S.C. § 1450 (Payment of Annuity; Beneficiaries) (Armed Forces).

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as he may provide under subsection (j)),

a month's annuity under section 1451 of this title shall be paid to—

(1) the elegible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares if the person to whom section 1448 of this title applies elected to provide an annuity for dependent children but not for the spouse; or

(4) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies becomes entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living, or if the widow or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity shall be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity

otherwise payable under this section would exceed that compensation.

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(j) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a) (3), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in the last three sentences of section 1448(a) of this title.

(g) Except as provided in section 1449 of this title or in subsection (f) of this section, an election under this section may not be changed or revoked.

(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 2771 (Final Settlement of Accounts, Deceased Members).

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

(b) Designations and changes of designation of beneficiaries under subsection (a)(1) are subject to regulations to be prescribed by the Secretary concerned. So far as practicable, these regulations shall be uniform for the armed forces, the Environmental Science Services Administration, and the Public Health Service.

(c) Under such regulations as the Comptroller General may prescribe, payments under subsection (a) shall be made by the military department concerned or the Department of the Treasury, as the case may be. Payment under clause (6) of subsection (a) shall be made—

(1) upon settlement by the General Accounting Office; or

(2) as otherwise authorized by the Comptroller General.

(d) A payment under this section bars recovery by any other person of the amount paid.

10 U.S.C. § 3504(a) (Recall to Active Duty).

The President may order any retired member of the Regular Army to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interests of national defense.

10 U.S.C. § 3889 (Computation of Length of Service Retired Pay).

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

10 U.S.C. § 3911 (Retirement).

The Secretary of the Army may, upon the officer's request, retire a regular commissioned officer of the Army

who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer.

10 U.S.C. § 3913 (Deferred Officers Not Recommended for Promotion).

(a) A deferred officer who is not recommended for promotion under section 3303(c) of this title, or an officer who is found disqualified for promotion under section 3302(f) of this title, shall, if he has at least 20 years of service computed under section 3927(a) of this title, be retired, except as provided by section 8301 of title 5, on such date as may be requested by him and approved under regulations to be prescribed by the Secretary of the Army, but not later than the first day of the seventh calendar month after the Secretary approves the report of the last board that did not recommend him for promotion to the grade concerned.

(b) Unless sooner retired or separated under another provision of law, a deferred officer who is not recommended for promotion under section 3303(c) of this title, or an officer found disqualified for promotion under sec-3302(f) of this title, who is not eligible for retirement under subsection (a) of this section or any other provision of law, but is within two years of becoming entitled to retirement under subsection (a) or some other provision of law, shall be retained on the active list in his regular grade until the date he completes 20 years of service computed under section 3927(a) of this title, or the first day of the seventh calendar month after the Secretary approves the report of the last board that did not recommend him for promotion to the grade concerned, whichever is later, and then retired.

10 U.S.C. § 3914 (Twenty to Thirty Years: Regular Enlisted Members Retirement).

Under regulations to be prescribed by the Secretary of the Army, a regular enlisted member of the Army who has at least 20, but less than 30, years of service computed under section 3925 of this title may, upon his request, be retired. He then becomes a member of the Army Reserve, and shall perform such active duty as may be prescribed under law, until his service computed under section 3925 of this title, plus his inactive service as a member of the Army Reserve, equals 30 years

10 U.S.C. § 3915 (Twenty-Five Years: Women's Army Retirement).

(a) Unless retired or separated at an earlier date, each officer of the Women's Army Corps whose regular grade is major shall be retired, except as provided by section 47a of title 5, on the thirtieth day after she completes 25 years of service computed under section 3927(a) of this title.

10 U.S.C. § 3916 (Twenty-eight Years: Promotion-List Lieutenant Colonels).

Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of lieutenant colonel shall be retired, except as provided by section 8301 of title 5, on the thirtieth day after he completes 28 years of service computed under section 3927(a) of this title. However, if his name is carried on the list of officers recommended for appointment to the regular grade of colonel, he shall be retained on the active list while his name is so carried.

10 U.S.C. § 3921 (Promotion-List Colonels, Retirement).

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of colonel shall

be retired, except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 30 years of service computed under section 3927(a) of this title, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of brigadier general, he shall be retained on the active list while his name is so carried.

(b) The Secretary of the Army may defer the retirement under this section of any promotion-list officer in the regular grade of colonel in the Medical Corps, Dental Corps, Veterinary Corps, Medical Service Corps, or the Chaplains, but not later than the date on which he becomes 60 years of age. The number of deferments in effect under this subsection for any one promotion list at any one time may not be more than 10 per cent of the number of colonels authorized for that list.

10 U.S.C. § 3922 (Thirty Years or Five Years in Grade: Regular Brigadier Generals Retirement).

(a) Unless retired or separated at an earlier date, each officer in the regular grade of brigadier general, other than a professor of the United States Military Academy, shall be retired, except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 30 years of service computed under section 3927(a) of this title, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of major general, he shall be retained on the active list while his name is so carried.

10 U.S.C. § 3923 (Regular Major Generals, Retirement).

Unless retired or separated at an earlier date, each officer in the regular grade of major general shall be retired,

except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 35 years of service computed under section 3927(a) of this title, whichever is later. However, the Secretary of the Army may defer the retirement under this section of—

(1) any such major general, but not later than the date on which he becomes 60 years of age; and

(2) any such major general who is serving in a temporary grade above major general, or who is serving in a position that carries a grade above major general, but not later than the date on which he becomes 64 years of age; and not more than five deferments under this clause may be in effect at any one time.

10 U.S.C. § 3929 (Computation of Old Age Retired Pay).

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

10 U.S.C. § 6482 (Authority to Recall Retired Enlisted Members of Regular Navy and Marine Corps).

In time of war or national emergency the Secretary of the Navy may order to active duty any retired enlisted member of the Regular Navy or the Regular Marine Corps.

10 U.S.C. § 8504 (Retired Members, Air Force).

(a) The President may order any retired member of the Regular Air Force to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interest of national defense.

11 U.S.C. § 523(a)(5) (Federal Bankruptcy Act) (Exceptions to discharge).

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

14 U.S.C. § 331 (Recall to Duty: Retired Regular Coast Guard).

In time of war or national emergency, the Secretary may order any regular officer on the retired list to active duty.

15 U.S.C. § 1673 (Garnishment Provisions).

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple

of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

Exceptions

(b)(1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.

(C) any debt due for any State or Federal tax

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with

respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

Execution or enforcement of garnishment order or process prohibited.

(c) No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

18 U.S.C. § 281 (Claims and Services in Matters Affecting Government (retained in force only for retired officers from the Armed Forces of United States by 76 Stat. 116 (1962); Note following 18 U.S.C.A. § 281 (Supp. 1980)).

Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

22 U.S.C. § 1104 (Foreign Service Act of 1980, § 820, P. L. 96-465).

(a) (1) An individual entitled to an annuity from the Fund may make allotments or assignments of amounts from such annuity for such purposes as the Secretary of State in his or her sole discretion considers appropriate.

(2) Notwithstanding section 3477 of the Revised Statutes of the United States (31 U.S.C. 203) or any other law, a member of the Service who is entitled to receive benefits under section 609(b) (1) may assign to any person the whole or any part of those benefits. Any such assignment shall be on a form approved by the Secretary of the Treasury and a copy of such assignment form shall be deposited with the Secretary of the Treasury by the member executing the assignment.

(b) (1) (A) In the case of any participant or annuitant who has a former spouse who is covered by a court order or who is a party to a spousal agreement—

(i) any right of the former spouse to any annuity under section 814(a) in connection with any retirement or disability annuity of the participant, and the amount of any such annuity;

(ii) any right of the former spouse to a survivor annuity under section 814(b) or (c), and the amount of any such annuity; and

(iii) any right of the former spouse to any payment of a lump-sum credit under section 815(a) or (b);

shall be determined in accordance with that spousal agreement or court order, if and to the extent expressly provided for in the terms of that spousal agreement or court order.

(B) This paragraph shall not apply in the case of any spousal agreement or court order which, as determined by the Secretary of State—

(i) would provide for a survivor annuity for a spouse or any former spouse of a participant with respect to which there has not been an annuity reduction (or a salary reduction or payment under section 814(c)(3); or

(ii) is otherwise inconsistent with the requirements of this chapter.

(2) Except with respect to obligations between participants and former spouses, payments under this chapter which would otherwise be made to a participant or annuitant based upon his or her service shall be paid (in whole or in part) by the Secretary of State to another individual to the extent expressly provided for in the terms of any order or any court decree of legal separation, or the terms

of any court order or court-approved property settlement agreement incident to any court decree of legal separation.

31 U.S.C. § 203 (Assignment of Claims; Set-off against Assignee.)

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

37 U.S.C. § 701 (Army/Air Force Anti-Assignment Act).

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

* * * * *

(c) An enlisted member of the Army or the Air Force may not assign his pay, and if he does so, the assignment is void.

38 U.S.C. § 410(a) (Dependency and Indemnity Compensation).

When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Administrator shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents.

41 U.S.C. § 15 (First Paragraph (Anti-Assignment)).

No contract or order, or any interest therein, shall be transferred to the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

42 U.S.C. § 402 (Social Security Act).

Wife's insurance benefits

(b)(1) The wife (as defined in section 416(b) of this title) and every divorced wife (as defined in section 416(d) of this title) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of wages and self-employment income of such individual,

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual, shall (subject to subsection(s) of this section) be entitled to the wife's insurance benefit for each month, beginning with the first month in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs—

(E) she dies,

(F) such individual dies,

(G) in the case of a wife, they are divorced and either (i) she has not attained age 62, or (ii) she has attained age 62 but has not been married to such individual for a period of 10 years immediately before the date the divorce became effective,

(H) in the case of divorced wife, she marries a person other than such individual,

(I) in the case of wife who has not attained age 62, the child of such individual is entitled to a child's insurance benefit,

(J) she becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of such individual, or

(K) such individual is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) Except as provided in subsection (q) of this section and paragraph (4) of this subsection, such wife's insurance benefit for each month shall be equal to one-half of the primary insurance amount of her husband (or, in the case of a divorced wife, her former husband) for such month.

(3) In the case of any divorced wife who marries—

(A) an individual entitled to benefits under subsection (f) or (h) of this section, or

(B) an individual who has attained the age of 18 and is entitled to benefits under subsection (d) of this section,

such divorced wife's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) (but subject to subsection (s) of this section), not be terminated by reason of such marriage; except that, in the case of such a marriage to an individual entitled to benefits under subsection (d) of this section, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under subsection (d) of this section unless he ceases to be so entitled by reason of his death.

(4)(A) The amount of a wife's insurance benefit for such month as determined after application of the provisions of subsections (q) and (k) of this section shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such wife (or divorced wife) for such month which is based upon her earnings while in the service of the Federal Government or any State (or political subdivision

thereof, as defined in section 418(b)(2) of this title) if, on the last day she was employed by such entity, such service did not constitute "employment" as defined in section 410 of this title.

(B) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of subparagraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit (as determined by the Secretary) and such equivalent monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in a lump sum if it is a commutation of, or a substitute for, periodic payments.

42 U.S.C. § 410(a)(6)(A) (Definitions Relating to Employment).

For the purposes of this subchapter—

Employment

(a) The term "employment" means any service performed after 1936 and prior to 1951 which was employment for the purposes of this subchapter under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1950 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the

United States by a citizen of the United States as an employee (i) of an American employer (as defined in subsection (e) of this section), or (ii) of a foreign subsidiary (as defined in section 3121(*l*) of Title 26, Internal Revenue Code of 1954) of a domestic corporation (as determined in accordance with section 7701 of Title 26, Internal Revenue Code of 1954) during any period for which there is in effect an agreement, entered into pursuant to section 3121 (*l*) of Title 26, Internal Revenue Code of 1954, with respect to such subsidiary; except that, in the case of service performed after 1950, such terms shall not include—

(6)(A) Service performed in the employ of the United States or in the employ of any instrumentality of the United States, if such service is covered by a retirement system established by a law of the United States; . . .

42 U.S.C. § 410(*l*)(1)-(4) (Definitions Relating to Employment).

For the purposes of this subchapter—

* * * * *

(*l*)(1) Except as provided in paragraph (4) of this subsection, the term "employment" shall, notwithstanding the provisions of subsection (a) of this section, include service performed after December 1956 by an individual as a member of a uniformed service on active duty; but such term shall not include any such service which is performed while on leave without pay.

(2) The term "active duty" means "active duty" as described in section 1101 of Title 38, except that it shall also include "active duty for training" as described in such section.

(3) The term "inactive duty training" means "inactive duty training" as described in such section 1101 of Title 38.

(4)(A) Paragraph (1) of this subsection shall not apply in the case of any service, performed by an individual as a member of a uniformed service, which is creditable under section 231b(i) of Title 45. The Railroad Retirement Board shall notify the Secretary of Health, Education and Welfare with respect to all such service which is so creditable.

(B) In any case where benefits under this subchapter are already payable on the basis of such individual's wages and self-employment income at the time such notification (with respect to such individual) is received by the Secretary, the Secretary shall certify no further benefits for payment under this subchapter on the basis of such individual's wages and self-employment income, or shall recompute the amount of any further benefits payable on the basis of such wages and self-employment income, as may be required as a consequence of subparagraph (A) of this paragraph. No payment of a benefit to any person on the basis of such individual's wages and self-employment income, certified by the Secretary prior to the end of the month in which he receives such notification from the Railroad Retirement Board, shall be deemed by reason of this subparagraph to have been an erroneous payment or a payment to which such person was not entitled. The Secretary shall, as soon as possible after the receipt of such notification from the Railroad Retirement Board, advise such Board whether or not any such benefit will be reduced or terminated by reason of subparagraph (A) of this paragraph, and if any such benefit will be so reduced or terminated, specify the first month with respect to which such reduction or termination will be effective.

42 U.S.C. § 659(a) (Social Security Act).

(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 662(c) (Social Security Act).

The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorneys' fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

Regulations of the Army of the United States 1908, Article LXXVI, § 1277.

1277. An officer may forward his pay account to a paymaster before maturity, the amount to be remitted to the

officer when due, or placed to his credit with a bank if the account is so indorsed, but an officer will not hypothecate or transfer an account not actually due. When due it may be transferred, when the following form of indorsement will be strictly observed:

Transferred this ..... day of ....., 19....., to .... and the chief paymaster at ..... has been so notified.

(Signature) .....,

.....

When an account is so transferred, the officer will notify the chief paymaster of the department in which he is stationed, or the paymaster who has been authorized by the Paymaster-General to pay his accounts, and will instruct the person or persons to whom the account may be transferred to forward it to such paymaster for payment. A transferred account will not be paid outside of the department in which the officer is regularly paid except when it is transferred for the benefit of his family residing in another department, in which case the officer will send the notification, through the office of the chief paymaster of the department in which he is usually paid, to the chief paymaster of the department in which the payee resides; the former to forward with the notification any information he may have affecting the validity of the account.

Cal. Civil Code § 4800(b) (1) (Division of Quasi-Community Property).

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

Cal. Civil Code § 4801(a) (9) (Spouse Support Order and Decree of Dissolution—Modifications, Revocation, Termination).

(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have occurred prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

Cal. Civ. Code § 4803 (Quasi-Community Property Defined).

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

Cal. Civil Code § 4804 (Quasi-community Property not Separate Property).

As used in this title and Section 5132 "separate property" does not include quasi-community property.

Cal. Civil Code § 4806 (Awards from Separate Property).

When either party in a proceeding under this part has either a separate estate, or is earning his or her own livelihood, or there is community property or quasi-community property sufficient to give him or her proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court may withhold any allowance to him out of the separate property of the other party. In any original or modification proceeding, where there are no children, and either party has or acquires a separate estate, including income from employment, sufficient for his or her proper support, no support order shall be made or continued against the other party.

Cal. Civil Code § 5105 (Interest of Parties in Community Property).

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Cal. Civil Code § 5118 (Earnings of Separated Spouse as Separate Property).

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

Cal. Civil Code § 5125(b) (Consent of Spouse for Disposition of Property).

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

Cal. Civil Code § 5150 (Purpose of Child Custody Act).

(1) The general purposes of this title are to:

(a) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(g) Facilitate the enforcement of custody decrees of other states.

(h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

(i) To make uniform the law of those states which enact it.

(2) This title shall be construed to promote the general purposes stated in this section.

No. 80-5

JAN

MICHAEL RO

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN MCCARTY,
Appellant,

vs.

PATRICIA ANN MCCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLEE'S BRIEF ON THE MERITS

WALTER T. WINTER
Counsel of Record
BARBARA R. DORNAN
100 Bush Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 433-5580
Counsel for Appellee

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

Whether Congress, by enacting statutory provisons creating and governing military retired pay, has mandated a pre-emption of State community property law such that California is precluded from treating Army retired pay as an asset subject to disposition by the court on dissolution of marriage.

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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN MCCARTY,
Appellant,

VS.

PATRICIA ANN MCCARTY,
Appellee.

On Appeal from the Court of Appeal of California
First Appellate District, Division Four

APPELLEE'S BRIEF ON THE MERITS

Appellee (hereinafter "Wife") requests this court to affirm the decision of the California Court of Appeals awarding her an interest in Appellant's (hereinafter "Husband") military retired pay in accordance with established California community property law.[1]

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[1]Although Husband states Wife's interest to be 43%, in fact, Wife's interest is computed at 110/243, or 45.3%, following the "time-rule" formula approved by the Opinion Below. See discussion infra, at Footnote 10 and accompanying text.

OPINIONS BELOW

The opinion of the Court of Appeal is unreported (J.S., App.A, p. 32).

The opinion of the trial court is set forth in the Interlocutory Judgment of Dissolution of Marriage (J.S., App.B, Document 3, p. 77), which is also unreported.[2]

The California Supreme Court denied Husband's Petition for Hearing without opinion. (J.S., App.C, p. 83).

JURISDICTION

Husband invokes this Court's jurisdiction under *28 U.S.C., § 1257*. In order for jurisdiction to lie under that section, the State Court decision to be reviewed must have "drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, Treaties or laws of the United States."

Although, Husband did raise variously phrased claims of Federal pre-emption, in the proceedings below, at no point in the proceedings below did Husband ever draw in question the validity of the California Statute regarding quasi-community property (*California Civil Code § 4803*). Similarly, at no point in the proceedings below has Husband claimed that application of said quasi-community property statute to him rendered that statute void. Rather, to the extent that Husband asserted any Federal claims whatsoever during the proceedings below, he has asserted

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[2]Husband's reference to the Memorandum of Intended Decision as an opinion below is inexplicable inasmuch as such Memorandum is not an order nor an opinion of the court below. The order of the trial court is contained entirely in the Interlocutory Judgment of Dissolution of Marriage.

only that application of *California Civil Code* § *4803* to him, and specifically to his military pension rights, imparied rights granted to him by Federal Statute.[3]

The California Court of Appeal in the present case was never asked to—and did not—address the issue of the validity or invalidity of a State Statute. Although Husband employed different wording to advance his claim at different levels in the proceedings below, the claim itself was always the same: That his entitlement to Military Retired pay under Federal Statute could not be impaired by application to him of the State quasi-community prop-

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[3]Appellant's Trial Brief submitted by him to the Trial Court herein (filed May 20, 1977) raises no issue or claim whatsoever regarding validity or invalidity of a California statute. Said Trial Brief discusses only the issues of domicile (which are not subject of Appellant's appeal to this Court) and an assertion that Appellant's pension rights are nondivisible by the California Court because nonproprietary in nature.

Appellant's Post Trial Brief submitted to the Trial Court herein and filed May 20, 1977 again raises no claim or issue of invalidity of a state statute, and urges instead that "Petitioner's [Appellant herein] Federal pension 'rights' are neither 'vested' nor 'matured' within the meaning of *In re Marriage of Brown* (1976) 15 C.3d 838, and hence Petitioner has no property interest subject to division by this Court."

Appellant's Briefs to the California Court of Appeal below consistently asserted only that "California's Quasi-Community Property Scheme conflicts impermissibly with *right* granted the husband under Federal legislation governing Army retirement pay" (Appellant's Opening Brief, Page 10); and that Appellant's entitlement" to certain retirement pay may not be "diminished" by application of state law (Appellant's Opening Brief, Page 12).

Thus, although Appellant's contentions below have been inconsistent, the one consistency that does appear from all of his contentions is that he has never at any point in the proceedings below drawn in question the validity or invalidity of a California statute.

erty law. Thus, the Court below ruled upon Husband's assertion of, and claimed impairment of, Federally created rights. The decision of the Court below rests squarely and exclusively on the decision of the California Supreme Court in the case of *In re Marriage of Fithian* (1974) 10 C.3d 592, cert. denied 419 U.S. 825. *Fithian*, like the case at bar, deals solely with a claim of impairment of Federal rights and does not draw in question the validity or invalidity of a State statute on any grounds.

Appeal to this Court does not lie from a State Court's denial of an assertion of Federal rights or privileges. If a litigant argues that his Federal rights prevent application of a State statute to him, an adverse decision by the State Court amounts to a denial of the litigants assertion of Federal rights, rather than a validation of the State statute, and no review lies under *28 U.S.C. § 1257(2). Mergenthaler Linotype Co. v. Davis* (1919) 251 U.S. 256, 259. Thus, where a claim was made that there had been a systematic discrimination against the litigant in the application of a tax statute or ordinance, in violation of his right to Equal Protection of the laws, or where it has been asserted that a tax assessment infringed a taxpayer's Federal privileges and/or immunities, it has been held that no appeal will lie because such claims did not draw in question the *validity* of the subject statute. *Charleston Federal Savings and Loan Association v. Alderson* (1945), 324 U.S. 182, 185; *Rohr Aircraft Corporation v. San Diego County* (1960) 362 U.S. 628; *Wilson v. Cook* (1946) 327 U.S. 474, 482.

See also *Hanson v. Denckla* (1958) 357 U.S. 235, 244.

And,

> "The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis for a writ of error from the Court." *Jett Bros. Distilling Company v. Carrollton* 252 U.S. 1 at 6 (1920).

Husband's appeal herein does not lie, and should be dismissed.

CONSTITUTIONAL PROVISIONS/STATUTES INVOLVED

The following California statutes are involved herein, in addition to those listed in Husband's Brief:

California Civil Code § 4800(a)
California Civil Code § 4803

In addition, the following federal and California statutes (which were not set forth in full in the Appendix to Husband's Brief) are referred to in this Brief:

5 U.S.C. § 8346(a)
10 U.S.C. § 1402
10 U.S.C. § 3991
California Civil Code § 4603
California Civil Code § 4509
California Civil Code § 4801(a)
California Civil Code § 5110
California Civil Code § 5125
California Civil Code §§ 5152, 5156

The foregoing are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This is a California action for dissolution of marriage commenced by Husband in 1976. (J.A.1)[4] In his petition to the Superior Court, Husband claimed that *all* property of the parties (even furniture) was his separate property and listed his military retirement benefits as an item of property to be confirmed to him. (J.A.2) Although Husband claimed that there was no community property because he was 'domiciled in Oregon', Husband also petitioned the court to determine the property rights of the parties "as provided by law". (J.A.2) Wife's response listed most of the parties' assets, including the military retirement benefits, as community property. (J.A.8)

Although child custody was presented as an issue in the original pleadings, that issue was resolved by stipulation *before* trial and was not presented to the trial court. (R.T. 4/12-14)[5]

The parties married March 23, 1957, while Husband was in medical school. (J.A. 32) July 1, 1958 Husband commenced active duty with the United States Army. When the parties finally separated October 31, 1976, they had been married 19 years and 7 months, of which 18 years and 5 months were while Husband was on active duty. As is not uncommon with military families, they had acquired very little property during their lengthy marriage: except for the military retirement, they had only two automobiles,

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[4]References to "J.A." are to the Joint Appendix, by page number.

[5]References to "R.T." are references to the Reporter's Transcript on Appeal from the Judgment of the Superior Court, and are to page/line of that Transcript.

furniture, and insignificant cash on deposit. (J.A. 42) As is also typical of military families, the parties and their children moved several times during their marriage. (J.A. 32) While such frequent moves may have been essential and helpful to Husband's career as an Army doctor, they are not conducive to the spouse's employment or career plans, if any. Wife was a housewife, unemployed at the time of trial (R.T. 37/7-8)

The trial court dismissed Husband's claim that he was an Oregon domicile (J.A. 43) after testimony that the parties left Oregon in 1959 and had not lived there since, (J.A. 63); that income tax returns were not filed in Oregon (J.A. 64); that Husband last voted in Oregon in 1968 (J.A. 65). The Court of Appeal affirmed the trial judge's weighing of the evidence, noting that "from the uncontroverted evidence noted above, that any finding regarding domicile would have been adverse to Husband."[6] The issue of Husband's domicile is not before this Court.

The trial court found that Husbands' military retirement benefits comprised an asset subject to disposition by the court, and, relying on *Civil Code §§ 4800 and 4803* ordered that:

> "(6) The [Husband] shall pay the [Wife] as long as she lives, that portion of his total monthly pension or retirement payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which [Husband] was in the U.S. Army for the total number of years he has served with the Army at the time of retirement,

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[6]Opinion of the Court of Appeal, J.S., App. A., p. 32 at 56.

and the Court retains jurisdiction to make such a termination at that time and to supervise distribution."[7]

On appeal, the Court of Appeal affirmed the trial court's disposition of Husband's military retirement benefits, relying on *In re Marriage of Gorman* (1979) 90 C.A.3d 454, [153 Cal. Rptr. 479] and *In re Marriage of Fithian* (1974) 10 C.3d 592 cert. den. 419 U.S. 829.

SUMMARY OF ARGUMENT

The concept of federal pre-emption, derived from the Supremacy Clause of the United States Constitution, is central to the state-federal balance of powers upon which the United States system of Government is founded. Equally central to that system is the recognition that certain subject matters are traditionally reserved to the powers of the states as being peculiarly local in nature. Among these, is the entire area of domestic relation law, including marriage and the relations between husband and wife, including their property relations, both during marriage and upon its dissolution. Therefore, as essential as the concept of federal pre-emption itself, is the principle that said concept is to be sparingly invoked, in the interests of the preservation of state-federal balances of power.

Before a federal law will be found to have pre-empted a state law (especially in an area traditionally reserved to the states), it must be shown that an actual conflict exists between the two legislative schemes *and* that the applica-

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[7]Interlocutory Judgment of Dissolution of Marriage, J.S., App. B., Document 3, page 77 at 80.

tion of the state law would result in clear and major damage to federal objectives or interests. The test is two-pronged:

(1) Conflict in the terms of the legislative schemes, *and*

(2) As a result of such conflict, damage to the federal interests.

A showing of conflict is esential; and mere conflict, without an additional showing of damage to federal interests, is insufficient. Neither element exists in the question presented to this Court herein.

The conflict between state and federal laws in an area traditionally governed by the states must be derived from Congressional declarations of intent. Nothing in the federal statutory scheme governing the military retired pay indicates a Congressional intention to pre-empt state community property law.

If Congress had provided separately for spouses under the military retired pay plan, an inference might arise that it meant to pre-empt state law. Congress has made no such provision.

If Congress had clearly stated that military retired pay could not be reached by anyone other than the retiree under any circumstances whatsoever, that might serve as an inference of Congressional intent to pre-empt. Congress has made no such clear statement. Nothing in Congressional enactments or the legislative history surrounding Congressional enactments indicates that Congress has ever addressed and decided the issue of whether

military retired pay is subject to community property laws of the states. To the extent that the subject appears at all in legislative history, it is apparent that Congress has deferred consideration of the issue, and therefore, cannot be deemed to have declared its intentions.

Inasmuch as the conflict is missing, it cannot be argued that any damage to federal interests flows from such conflict. Even if a conflict were to be found in the application of state community property laws to military retired pay, such conflict, to the extent it exists at all, does no damage to federal interests. The overriding federal interest involved in the military retired pay system is that of attracting and maintaining a military force. Neither the building of such a military force, nor the maintenance of the morale of such military force is seriously threatened by allowing the members of such military force to undertake the obligations and duties of marriage as freely as civilians. It cannot seriously be argued that the morale of our military force requires that the spouses of said military force be stripped of the protections of domestic relations law, so that the expectation of a person marrying a military member is that he or she will become a second class citizen, deprived of the ordinary property rights and expectations of a person marrying a civilian. The spouses and families of members of the military force undergo significant sacrifices because of the nature of military career. To create an additional sacrifice demanded of such spouses, and thus possibly decrease marital stability of military members, will not greatly improve the morale of the members of the military.

ARGUMENT

I

Careful examination of both the State and Federal statutory schemes is required in order to evaluate Husband's pre-emption claim.

A

THE CALIFORNIA LAW

1. *In General.*

California is one of eight community property states at the present time.[8] Fundamental to the community property system is a premise that the husband and wife are equal partners in marriage, that each of them is deemed to make an equal contribution to the marital enterprise, and that each of them therefore shares equally in the fruits of that enterprise. Except for certain specified exceptions which are deemed separate property of one or the other spouse, all property acquired during the marriage is presumed to be community property, owned equally by husband and wife. *California Civil Code § 5110.* All property

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[8]Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Puerto Rico has a system of conjugal property which is similar to community property. However, it should be noted that although the case at bar addresses only the California system of community property, at the present time, several non-community property states also consider military retired pay to be divisible upon divorce or dissolution of marriage. *In re Marriage of Miller* (Mont.) 609 P.2d 1185 (1980); *In re Marriage of Musser* (Ill.) C.88 N.E.2d 1289 (1979); *Chisnell v. Chisnell* (Mich.) 267 N.W.2d 155, cert.den. 442 U.S. 940 (1979); *Kruger v. Kruger* (N.J.) 375 A.2d 659 (1977); *Bodenhorn v. Bodenhorn* (Canal Zone) 567 F.2d 629 (5th Cir. 1978).

or other acquisitions which are the result of the time, skill, and efforts of either spouse during the marriage belongs to the community, regardless of which spouse may have actually performed the labor or services from which the acquisition flows. Thus, the time, skill, and efforts of the husband belong to the community and any fruits therefrom belong to the community. Equally, the time, skill, and efforts of the wife belong also to the community, as do the fruits of those time, skill, and efforts. The presumption that property acquired during the marriage is community property is a rule of substantive law, not merely one of procedure or evidence. 439 U.S. 572 at 593. Further, the ownership interests of the spouses in the assets of the marital community are present, existing, and equal interests. *California Civil Code* § *5105*. It should be noted that California community property law is not merely a formula governing the division of property at the end of a marriage, but also one which governs the ownership and control of property during the course of the marriage, affecting both the spouses *inter se* and third parties dealing with the community or either of its members during the continuation of the marriage. *California Civil Code* § *5125*.

Upon dissolution of marriage (formerly divorce) in California, the division of property between husband and wife is governed by community property rules, and at the end of the marriage, each spouse has an equal and absolute right to receive his or her one-half interest in all of the property of the community without regard for the reasons for the breakdown of the marriage, or for the relative financial circumstances of the parties from their separate estates. *California Civil Code* § *4880* restricts the trial court

to making an *equal* division of all community property on dissolution of marriage.

In addition, upon dissolution of marriage (but not during the continuance of the marriage), the doctrine of quasi-community property is called into play. The California quasi-community property law is set forth in *Civil Code* § *4803* which provides,

> "As used in this part, [Family Law Act], 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:
>
> (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
>
> (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition." (Emphasis added.)

Civil Code § *4800* includes all quasi-community property within its mandate of an equal division.

Thus, in dissolution of marriage in California, each party receives one-half of the community and quasi-community estate as his or her substantive property right, entirely independent from his or her right to seek support from the other party.

The award of spousal support in California is governed by *Civil Code* § *4801(a)* under the terms of which the trial court examines certain factors, including the parties'

relative financial circumstances (which was irrelevant to the divisions of community and quasi-community property), in order to make a determination whether either spouse is entitled to continuing support from the other.

California combines community property with the system of "no-fault" divorce or dissolution of marriage. Therefore, the California trial court does not and may not take into consideration any element of fault either in its division of community and quasi-community property, or in its determination of whether to award spousal support to either party (and, if support is awarded, its determination of the amount and duration of such support).[9]

2. *Retirement Benefits.*

California law governing treatment of pensions and/or retirement benefits on dissolution of marriage is set forth in

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[9]In Husband's Brief on the Merits, Footnote 76 is an unfortunate violation of the admonition to counsel to refrain from introducing irrelevant and scandalous material in Briefs to this Court. Rule 34(6) Rules of the Supreme Court of the United States. More importantly, Footnote 76, whether deliberate or inadvertent, is a gross misstatement of California law governing dissolution of marriage. California trial court hearing a marital dissolution may *not under any circumstances,* ever consider the causes behind the breakdown of the marriage either in dividing the marital property or in setting a level of support. Indeed, where, as in the present case, child custody is not at issue because it was resolved by stipulation (see Reporter's' Transcript on Appeal, 4/12-14), evidence of "specific acts of misconduct" by either party are inadmissible, *and* it is improper for the Court to receive such evidence or for counsel to attempt to introduce such evidence. *California Civil Code* § 4509. An attempt by husband to bring such matters before the trial court—such as his attempt to bring them before this Court—not only would have failed, but may well have subjected counsel to reprimand by that court.

case law rather than statutes. Husband misstates the California law on this subject in several important respects.

In 1974, the California Supreme Court held that once a military pension had vested, the State was not precluded from treating it as an item of community property for purposes of division of that property on dissolution of marriage. *In re marriage of Fithian,* 10 Cal.3d 592, 517 P.2d 449, cert. den. 419 U.S. 825. The vesting requirement included by the Court in *Fithian* reflected then California law governing both public and private pensions. However, in 1976, the California Supreme Court held that vesting was not a prerequisite and that nonvested pension and/or retirement rights also constituted property, to be treated as divisible assets upon dissolution of a marriage. *In re marriage of Brown,* 15 Cal.3d 838, 544 P.2d 561.

In *In re marriage of Milhan,* 27 Cal.3d 765 (July, 1980), the California Supreme Court has very recently affirmed that *Fithian,* as expanded by *Brown,* is the present California law governing treatment of military retired pay on dissolution of marriage.

Following *Fithian,* a California trial court treats military pensions the same as any other pension plan, whether public or private in source. The community has an interest in the employee/service member's plan interest, to the extent that it is attributable to employment/service during the marriage. The community interest is reduced to a percentage by the use of the so-called time rule: the ratio of the length of employment/service during marriage (defined as the period between the date of marriage and the date of separation) over the total length of employment/service

as of the date when the employee/service member begins to receive benefits.[10] It is central to the California community property treatment of retired pay that the community has only an interest in what the employee/service member has. The community and/or the nonemployed spouse do not acquire their own separate pension right or benefit; and, it follows, the interest or rights of the community cannot exceed or surpass the interests or rights of the member. Thus, the interest of the community is subject to disfeasance if the member's interest fails for any reason. For example, if a member receives nothing by way of retired pay because he dies (or chooses to leave the service before completing the required number of years of service) then the community has only a percentage interest in nothing.

It is not surprising that the list of "implications" set forth at Pages 31-35 of Husband's Brief is unsupported by any citation to California authority, inasmuch as each scenario drawn by Husband is in fact precluded by California law on the subject.

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[10]*In re Marriage of Anderson* (1976) 64 C.A.3d 36, 40. Consider a service member who commences service January 1, 1960 is married January 1, 1965, and separates permanently from his wife January 1, 1975. If the member retires on January 1, 1980, of his 20 years total service, 10 occurred during the marriage and the community has a 10/20 or 50% interest in the member's interest in the plan. If the member retired in 1983, the community would have a 10/23 or 43.4% interest. Compare a service member who completes his 20 years of service and retires prior to marriage. In that case, the community has no interest because none of the applicable years of employment/service occurred during the marriage relationship.

The trial court may award the nonservice spouse other community property which has a value as of the time of trial equal to the actuarially determined value of the community portion of the retirement benefit as of the time of trial.[11] Alternatively, as is perhaps more frequently done, the court may order that the non-member spouse receive his or her community interest in the retirement benefits *if, as,* and *when* benefits or payments under the plan shall be received by the service member. Thus, if the community has a 50% interest in the service member's plan rights, the nonservice spouse is awarded her one-half of that interest, or 25% of the benefits or payment, but only *if, as,* and *when* the service member himself actually receives that benefit. Therefore, if the service member chooses for reasons of his own to retire after 19 years, 11 months of service, the ex-spouse, like the service member, will receive nothing. If the service member chooses to continue in service beyond the 20 year mark, the ex-spouse must wait for her benefits until the service member actually retires and actually receives his benefits. Furthermore, although the ex-spouse has an interest in the service member's retirement interest,

> "It does not follow, however, that should the ex-wife die, her rights would descend to her heirs, and that the serviceman could thus become obligated to the ex-wife's future husband or subsequent children. In California it is clear that the heirs of the ex-wife are not entitled to the portion of retirement benefits the ex-wife would have received had she lived. (*Waite v. Waite* (1972),

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[11]The actuarial determination, of course, takes into account the probabilities of various forms of disfeasance of the pension before it is received, such as the service member's mortality rate.

> *supra*, 6 Cal.3d 461.) As stated in *Bensing v. Bensing* (1972), supra, 25 Cal.App.3d 889, 894 (hg.den.), 'the pension terminates with the death of the husband, and the wife's share also terminates if she predeceases husband.' " *In re marriage of Fithian*, 10 Cal.3d 592 at 601.

And, the service member remains free to make other elections with respect to his benefits:

> "Although insurance proceeds are community property to the extent the policy was purchased with community funds [citations], the principle does not extend to annuity plans created in the employment context. In *Benson v. City of Los Angeles* (1963), supra, 60 Cal.2d 355, we held that the rights of a widowed second wife take precedence over those of an ex-wife whose community funds were converted from husband's retirement plan to a related annuity contract. Characterizing the retirement benefits as community property, therefore, does not conflict with the serviceman's right to choose an eligible beneficiary under the annuity plans Congress established in coordination with the retirement system." Ibid.

3. *Quasi-Community Property/Domicile.*

Section 4803 does not, as Husband claims, invest the non-Army spouse with a new ownership right immediately upon relocation within the State.[12] A predecessor to § *4803*, which did have that result, was held unconstitutional by the California Supreme Court. *Estate of Thornton* (1934) 1 C.2d 1, [33 P.2d 1]. The *Thornton* Court stated that property ac-

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[12]The opinion below addressed this precise issue. J.S., App. A., 32 at 49.

quired elsewhere by a domiciliary of another state cannot, ". . . be converted into community property by the mere act of bringing it into a community property state . . ." 1 C.2d 1 at 4.[13]

As a result of *Thornton*, the predecessor to § *4803* was enacted to provide that its terms become applicable only for the purposes of division of property on dissolution of marriage. Ownership of the service member's pension rights remains unaffected by that service member's relocation within the State of California. Such pension rights will only be deemed quasi-community property if both husband and wife become domiciles of California *and* thereafter one of them institutes a divorce proceeding within the State of California. The new quasi-community property statute survived a constitutional challenge specifically because it was held to become operable only if both preconditions were met: Both spouses become domiciles of California and a divorce is filed here. *Addison v. Addison* (1965) 62 C.2d 558, [399 P.2d 897]; *In re Marriage of Roesch* (1978) 83 C.A.3d 96, 107. Therefore, since the California domicile of both spouses is a prerequisite to the application of § *4803*, its reach can be avoided by a service member who maintains his domicile in another state even though the Army locates him within the State of California. His spouse's domicile alone will not be enough to bring the code section into effect if the divorce is commenced in California. That a service member may retain a domicile at a location other than his duty assignment is a well-established doctrine to-

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[13]*Thornton* held then Civil Code § 164 unconstitutional.

tally overlooked by Husband herein. *Finger v. Masterson* (1957) 152 F.Supp. 224; *Wise v. Bolster* (1940) 31 F.Supp. 856; *Sweeney v. District of Columbia*, 113 F.2d 25, cert. den. 310 U.S. 631.[14]

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[14]Under California law, husband and wife may have different domiciles. Therefore, it is conceivable that a California divorce action could be brought by the service spouse as a California domicile, even though the service member were domiciled in another state. Although the California Court in such a situation would have jurisdiction to dissolve the marriage, § 4803 would not apply in such a case, and the California divorce court would not reach the service member's retirement benefits (or for that matter, any other property) acquired while domiciled outside of California.

In this case, the trial court found and the Court of Appeal affirmed that Husband was a California domiciliary. The Court of Appeal below further held that even if Husband had not been a California domiciliary, by the act of commencing the California action for dissolution of his marriage, Husband submitted himself to the application to him of California laws governing dissolution of marriage. Although Husband herein states that he "found himself" before the California Court, in fact he placed himself before that Court by filing in California and not in Oregon, his claimed State of domicile. Husband's assertion that he was required to file in California in order to seek custody of his children is flatly contradicted by California statute. In view of the fact that all of the children lived and had lived in California for several years, it is clear that California would have jurisdiction over the issues of child custody under the Uniform Child Custody Jurisdiction Act. (*California Civil Code* § 5152 and § 5156.)

However, *California Civil Code* § 4503 specifically states that an action may be brought in California to determine child custody *without* also being an action for dissolution of marriage in California.

B

MILITARY RETIRED PAY

1. *In General.*

Military Retired Pay is an integral and immense part of the overall structure of military pay in general.[15] At the present time, the budget for retired pay is as large as the budget for current salaries for those on active duty in the military.[16]

Statutory provisions provide for both mandatory and voluntary retirements.[17] Provision is also made for three different types of retired pay: reserve, disability, or nondisability.[18] Nondisability retirement pay for retirement from active duty is by far the largest category numerically and is the type of retired pay which is the subject of the appeal herein.[19]

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[15]See generally, House Armed Services Committee Rep. No. 95-85, *Preliminary Review of Military Retirement Systems* Hearings before the Military Compensation Subcommittee of the House Armed Services Committee, 95th Cong., 1st and 2nd Sess. 5 (1977-78) (Statements of Col. Leon S. Hirsch, Jr.) (CIS Index H201-49) [hereinafter cited as H.A.S.C. Rep. No. 95-85]

[16]Fiscal year 1979 Defense Budget Overview: Hearings before the Task Force on National Security and International Affairs of the Committee on the Budget, House of Representatives, 95th Cong., 2nd Sess. 370 (1978) (Statement of Robert L. Leggett, Chairman).

[17]10 U.S.C. §§ 3841-3855 (Separation or Transfer to Retired Reserves); 10 U.S.C. §§ 3911-3929 (Retirement for Length of Service, Army); 10 U.S.C. §§ 3883-3889 (Retirement for Age); 10 U.S.C. §§ 6321-6322 (Voluntary Retirement); also, see generally HASC Rep. No. 95-85, supra, note 15 at 6-7.

[18]See HASC Rep. No. 95-85, supra, note 15.

[19]See HASC Rep. No. 95-85, supra, note 15.

Upon nondisability retirement from active duty, whether voluntary or mandatory, the retiree receives retired pay fixed at a level computed solely by reference to the service member's final rank achieved and the service member's total number of years served on active duty. (10 U.S.C. § 3991) No other factors affect the level of the retired pay, and the retiree is not required to perform any current duties as a prerequisite to the receipt of his retired pay.

The amount of retired pay is generally 50% of the service member's base pay for 20 years' service, and up to 75% of the base pay for 30 years' service.[20] The generous level of retired pay, coupled with the fact that retirement can occur after 20 years of service, without any requirements of minimum age of the retiree, provides a very strong inducement for young military members to remain in the service. Military careers are typically short: In 1977, the average of retirement was 42 years, after 22½ years of service.[21] Thus, military retirees are typically retired with a generous federal pension, while still young enough to commence and enjoy a lengthy and civilian career as well.[22]

In addition to the Army Retired pay system, the service member, like his or her spouse, if employed, contributes to the Social Security Administration and is entitled to ail

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[20]See U.S.C. §§ 1401, 3991, 8911.

[21]See HASC Rep. No. 95-85, supra, note 15.

[22]Surely, Congress is not unaware of the efficacy of such deferred compensation as an inducement to young service members to remain in the service, especially to professionals, such as Dr. McCarty, who might otherwise be drawn to the more lucrative career opportunities in the civilian world. It must be assumed that Congress is aware of the power of financial incentives.

benefits provided by that System, separate and apart from any Army or other military retirements benefits. In this regard, the military family is just like any other family, and the military retirement pay, like civilian retirement plans, provides additional retirement income over and above Social Security.

2. *Viewed Realistically, Military Retired Pay Is Deferred Compensation For Active Duty.*

It has been suggested that because a military retiree remains subject to recall under very limited circumstances of national emergency, that the retiree's retired pay constitutes current payment for current services rendered. The argument fails on several grounds:

(1) No act, service, or duty is required of a military retiree, such as Husband herein, as a prerequisite to his right to receive the retired paycheck each month. Upon completion of the 20 years active duty, the military member's pension or retirement is vested or accrued, and the service member has an enforceable right to the payments upon his retirement. The level of the retired pay itself is based solely upon the rank attained by the service member *prior to retirement,* and on the number of years served on active duty prior to retirement. 10 U.S.C. § 3991. Thus, not only the right itself, but also the criteria which determine the value of the right, derive entirely from pre-retirement factors.

(2) Retired service members do suffer a limited vulnerability to recall in a national emergency. 10 U.S.C. § 3504(a). However, that such vulnerability to recall does not constitute the reason for the payment of retired pay is evident from the fact that millions of servicemen who sep-

arate from the service before they are eligible for retired pay also undergo a period of vulnerability to recall in the event of a national emergency. (See e.g. 10 U.S.C. § 269).

Husband cites the Court of Claims case of *Lemly v. United States,* 75 F.Supp. 248, 249 (Ct.Cl. 1948) for the proposition that retired pay is distinct from a pension because of the aspect of vulnerability to recall. However,

> "In *Lemly,* the court of claims was faced with the question whether a Naval Reserve office who contracted a disabling disease while on active duty was entitled to post-retirement compensation for his service-connected disability. Because the court of claims has jurisdiction over claims for retirement pay, but not claims for pensions, the court distinguished the two types of benefits, and determined that retirement pay is compensation for services presently being performed since the recipient is subject to all times to recall to active duty.
>
> Whether retirement pay is a pension and thus excluded from the jurisdiction of the court of claims is far removed from the problem of classifying retirement benefits under state community property law, and is not authoritative on the latter issue. Furthermore, in Gordon v. United States (1956) 140 F.Supp. 263 [134 Ct.Cl. 840], the court of claims reconsidered the nature of retirement pay and concluded that it is awarded to servicemen 'for the reason that it is something they earned while in the service of their country.' " *In re marriage of Fithian, supra,* 10 Cal.3d at 603.

(3) If in fact a retired service member (or for that matter an ex-service member separated before entitlement to retired pay) is recalled to active duty in the event of a

national emergency, he then receives additional compensation according to the active duty pay scale for his active duty services, which compensation unquestionably is current pay for current services rendered. In addition, after such recall to active duty, a service member's rate of retired pay thereafter will be increased because of the additional length of service. 10 U.S.C. § 1402.

The reasoning of the California Supreme Court was sound when it declared,

> ". . . military retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. . . . The conclusion is inescapable that retirement pay is awarded in return for services previously rendered. . . ." *In re marriage of Fithian, supra,* 10 Cal.3d at 604.

See also *In re marriage of Miller* (Mont.) 609 P.2d 1185, 1186-7 (1980).

II

WHETHER A SPECIFIC RIGHT OR BENEFIT CONSTITUTES "PROPERTY" IS GOVERNED BY STATE LAW

Throughout the proceedings herein, Husband has asserted that military retired pay does not constitute property. Husband's arguments are not pertinent herein, inasmuch as the determination of what does or doesn't constitute "property" for purposes of application of state laws

regarding property is a state, and not a federal, question. *Beal v. Missouri Pac. RR Corp.*, 312 U.S. 45.[23] It is well established under California law that retirement benefits do constitute property for the purposes of application of the California laws governing division of property on dissolution of marriage, whether such retirement benefits are vested, unvested, contingent, contractual, noncontractual, or otherwise. Certainly the Federal Government has no interest in telling California that it cannot apply its own law to "property" unless such "property" is "contractual" or "vested."[24] The only question before this Court is whether or not California, once having found that retirement benefits do constitute "property" subject to disposition on dissolution of marriage, is precluded from applying such laws to certain specified retirement benefits by the mandates of the Supremacy Clause.

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[23]The United States is in agreement that the question of whether or not Federal retirement benefits can be considered "Property" at all is not a pertinent question. See Solicitor General's Brief for the United States filed in the matter of *Hisquierdo v. Hisquierdo*, No. 77-533, October Term, 1978.

[24]However, even if that were a question for federal determination, the question whether a certain right may be contractual or vested or otherwise, is not determinative of whether that right may be designated "property." Expectancies, although neither vested nor contractual, can constitute property rights. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

III

FEDERAL PRE-EMPTION OF STATE LAW OCCURS ONLY WHERE THERE EXISTS AN ACTUAL CONFLICT BETWEEN THE STATE AND FEDERAL LEGISLATIVE SCHEMES OR AN UNAMBIGUOUS CONGRESSIONAL MANDATE OF PRE-EMPTION AND ACTUAL DAMAGE OR INTERFERENCE WITH FEDERAL INTERESTS

The doctrine of Federal pre-emption of State statutes is one which has historically been sparingly applied when the Federal Legislation in question touches upon a subject matter traditionally occupied by the States. As stated by this Court in *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, where the congressional Legislation in question touches upon an area traditionally occupied by State Legislation,

> ". . . we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the *clear and manifest* purposes of Congress." [Emphasis supplied]

This principle has been reaffirmed by this Court.

> "The settled mandate governing this inquiry, in deference to the fact that a State regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a Federal displacement 'unless that was a clear and manifest purpose of Congress,' [citing *Rice, supra*]. In other words, we are not to conclude that Congress legislated the ouster of this California statute . . . in the absence of an unambiguous Congressional mandate to that effect." *Florida Avocado Grower's v. Paul* (1963) 373 U.S. 132, 146-7.

This principle of caution in the application of the pre-emption doctrine serves to maintain and protect the balance between State and Federal powers which is well-rooted in American Federalism. The importance of maintaining that State-Federal balance has been discussed by this Court in *United States v. Bass* (1971) 404 U.S. 336, 349:[25]

> "In traditionally sensitive areas, such as legislation affecting the Federal balance, the requirement of clear statement assures that the legislature has in fact *faced,* and *intended to bring into issue,* the critical matters involved in the judicial decision." [Emphasis added]

A traditional area of State police powers, protected by the presumption against Federal pre-emption, is the subject of marriage and domestic relations, including marital property laws.

> "Insofar as marriage is within temporal control, the States lay on the guiding hand. 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *In re Burrus* 136 U.S. 586, 593-594, 34 L.Ed. 500, 10 S.Ct. 850. (1890)."
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> *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581.

Such has been the case throughout the history of this nation, with the result that,

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[25]Although *United States v. Bass* discusses the Federal balance in the realm of criminal jurisdiction, the Federal concerns expressed there are equally applicable to the Federal-State balance in the areas of non-criminal legislation. *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.

> "there is no Federal law of domestic relations, which is primarily a matter of State concern." *DeSylva v. Ballentine* (1956) 351 U.S. 570, 580.

This Court has also recognized that the peculiarly local State laws regarding and defining rights and obligations between husbands and wives are typically

> ". . . part of an ingenious, complex, and highly purposeful distribution of property rights between husband and wife, geared to the institution of community property and designed to strike a balance between efficient management of joint property and protection of the separate property of each spouse." *United States v. Yazell* (1966) 382 U.S. 341, 350.

Thus, Federal determination of pre-emption as to one specific matter or item, even though inspired by the desire to protect Federal interests, is likely to cause consequences and repercussions to the parties, through the interaction of the complicated and interdependent State rules surrounding marriage and marital property, which consequences and repercussions the Federal courts are unlikely to foresee. Therefore, it has been stated by this Court,

> "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Yazell, supra*, 382 U.S. at 352.

And more recently,

> "On the rare occasion when state and family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore v. Markoe*, 196 U.S. 68, 77, 49 L.Ed. 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' Federal interests before the Supremacy Clause will demand that State law be overridden. [Citing *Yazell, supra.*]" *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581.

Thus, to find pre-emption not only must there be a conflict between the state and federal schemes, but the state scheme must do actual damage to federal aims. The federal government has no interest in nullifying state law which, although conceptually at odds with federal law, does no damage to and does not interfere with federal interests or aims.

IV

CONGRESSIONAL ENACTMENTS REGARDING MILITARY RETIRED PAY DO NOT PRE-EMPT CALIFORNIA COMMUNITY PROPERTY LAWS REGARDING DIVISION OF PROPERTY UPON DISSOLUTION OF MARRIAGE

The most recent delineation by this Court of pre-emption principals in the area of Family Law is, of course, *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). In *Hisquierdo*, while reaffirming the general presumption against pre-

emption discussed above, this Court did find that Congress, in enacting the Railroad Retirement Act, had pre-empted the application of California community property laws to benefits under the Railroad Retirement Act. The pre-emption found in *Hisquierdo* was implied from what this Court saw as extensive Congressional planning in the structure of the Railroad Retirement Act. This Court noted specifically two primary factors in the Railroad Retirement Act Legislation: (1) the inclusion in the Railroad Retirement Act of a limited "community concept", providing a separate payment to a spouse; 439 U.S. 572, at 584 *and* (2) a strong nonattachment and nonanticipa*tion* clause (§ 231M), which this Court identified as the "protector" of Congress' decision to protect the railroad worker's retirement pay from fluctuations of state law by creating the limited "community property" concept. 439 U.S. 572 at 585.

By comparison, the factors which supported a finding of pre-emption with respect to the Railroad Retirement Act are not present in the Congressional scheme governing military retired pay.

A. Military Retired Pay Includes No Provision For A Separate Spousal Payment

The Railroad Retirement Act created a separate entitlement for the spouse of the railroad employee, and then provided specifically that the separate spousal entitlement would cease upon divorce. 45 U.S.C. § 231d(c)(3). In addition, when the Railroad Retirement Act was revised in 1974, Congress specifically considered and rejected a proposal to extend the separate spousal benefit to a divorced

spouse, following the example of the Social Security Act. *Hisquierdo, supra*, 439 U.S. 572 at 585. Thus, from the Act itself and from its legislative history, this Court was able to conclude that Congress had consciously considered and decided the issue of treatment of Railroad Retirement Act benefits upon dissolution of marriage.

Nothing similar can be found anywhere in the statutes governing military retired pay.[26] A retired Army officer does have the option of voluntary participation in the survivor benefit plan, 10 U.S.C. §§ 1447-1455, which allows the retired member to decrease the amount of the retired pay payments received by him each month in order to fund an annuity which will be payable to his children *or* his widow upon his death. These provisions, unlike the separate spousal payment provision of the Railroad Retirement Act, do not create a separate entitlement for a spouse but simply provide an option for the retired member to, in effect, invest part of his entitlement to fund a future annuity to be paid after his death. The inclusion by Congress of provisions for such an annuity, payable after death of the retired member, are totally unrelated to the concept of a separate payment to a spouse while the retired member still lives. An attempt to compare the

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[26]As Husband points out, both the service member and the service member's spouse, if employed, contribute to the Social Security Administration and are eligible for all benefits available pursuant to the Social Security act. However, Social Security benefits are entirely separate and apart from military retired pay and can no more be considered a part of the package of military retired pay than they could be considered a part of the package of a retirement plan from a private employer

two types of provisions will yield only apples on the one hand and oranges on the other.

> "Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death." *In re marriage of Fithian*, supra, 10 Cal.3d at 600.

The treatment of ex-wives and the treatment of widows do not present analogous problems or considerations. Congress' choice to provide for widows in the case of military retired pay cannot be compared with the Congress' choice to provide for spouses of living retirees in the Railroad Retirement Act.

Compare the provisions of the Social Security Act, which do set up a separate payment for spouses even after a divorce, provided that the marriage was of a certain minimum duration.[27] California Courts have recognized pre-emption by Congress in the Social Security Act, and have held that California is foreclosed from treating or dividing Social Security benefits as community property because of Federal pre-emption of the field. *In re Marriage of Nizenkoff*, 65 C.A.3d 136 [135 Cal.Rptr. 189] (1976).

Compare also, the Federal Civil Service Retirement System (5 U.S.C. §§ 8331-8348). The statutes governing Civil Service pensions, like the statutes governing military retired pay, provide no separate spousal benefit. By amendment in 1978, Congress has specifically allowed at-

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[27]Pub.L. No. 95-216, 91 Stat. 1509 (1977); 42 U.S.C. § 416(d)(1).

tachment of Civil Service pensions for the purpose of satisfying state community property settlements. 5 U.S. Code § 8345(j) (1) (1976 and Supp. II 1978).

B. There Has Been No Congressional Statement Of Anti-Attachment or Anti-Anticipation Of Regard To Military Retired Pay

Assignment, attachment, and anticipation of benefits—though related concepts—are not identical. The distinctions have been noted by this Court in *Hisquierdo* in discussing the uniquely broad reach of § 231M of the Railroad Retirement Act.[28] 439 U.S. 572, 584-586.

Congress has passed a statute governing *assignment* of military pay and military retired pay: 37 U.S.C. § 701(a) and (c).[29]

This section controls the retiree himself, either prohibiting (or, as in Husband's case herein, *allowing*) the retiree to make an assignment. This statute does not address or control third parties, such as creditors. Section 701 is silent as to either attachment or anticipation of benefits.

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[28]45 U.S.C. § 231M, "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

[29]Interestingly enough, although enlisted members may not assign their pay or retired pay, officers, such as Dr. McCarty herein, are allowed to assign their pay and/or retired pay. 37 U.S.C. § 701(a); § 1-17, Army Regulation No. 37-104-1, issued by Headquarters, Department of The Army, Washington, D.C., July 1, 1977.

By comparison, the concepts of attachment and anticipation are not directed solely to the member/retiree, but involve third parties. Congress has never passed either an anti-attachment or an anti-anticipation provision applicable to military pay or military retired pay.

The only concept of non*attach*ability which is applicable to military retired pay derives not from a Congressional statement, but rather from a loose judicial doctrine traceable to *Buchanan v. Alexander*, 45 U.S. (1 How.) 20 (1846), which sets forth the concept that sovereign immunity prevents the garnishment of a sailor's wages by creditors while those wages are still held up by the government. The doctrine of sovereign immunity remains to this day the only source for any concept of nonattachability of military retired pay. Congress has never enacted a statutory prohibition against attachment of military pay or retired pay.

Significantly, this court has suggested that general concepts of sovereign immunity are not sufficient to require pre-emption of state law. Finding pre-emption in *Hisquierdo*, this Court specifically noted that § 231M of the Railroad Retirement Act did not merely "restate the government's sovereign immunity from burdensome garnishment suits. . ." 439 U.S. 572, 585-6, but goes beyond to state that the benefit "shall not be subject to 'any legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' " 439 U.S. 572, 586.

By comparison, for military pay and military retired pay, Congress has remained silent regarding nonattachability,

and *has* left the matter governed solely by the traditional sovereign immunity doctrine.

The sovereign immunity doctrine derived from *Buchanan v. Alexander, supra,* does *not* include any anti-anticipation provisions of the sort found to be so meaningful by this Court in *Hisquierdo,* and Congress has enacted none with respect to military pay and retired pay.

The specific provisions of § 231M which this court found controlling are conspicuously absent from the statutory scheme created by Congress to govern military retired pay. The "unambiguous mandate" essential to a finding of pre-emption, cannot be found.

C. Congressional Statement That Retirement Benefits Are "Personal Entitlement" Of Member Indicate Only That Benefits Cease Upon Death Of Service Member

It is true, as Husband points out, that Congress has stated that military retired pay is to be considered a "personal entitlement payable to the member himself as long as he lives." Senate Report No. 1480, 90th Cong. 2nd Sess. (1968). However, examination of the quoted statement in context reveals clearly that Congress used the phrase "personal entitlement" simply to signify that the retirement benefits would cease upon the death of the serviceman, and therefore, not be available as a continuing source of support for the serviceman's dependents. Congress refers to military retirement benefits as the "personal entitlement" in the context of underscoring the need for an annuity plan in order to provide for a *deceased* serviceman's family. (1968 U.S. Code Cong. and Admin. News, Page 3300.)

The application of California community property laws to military retired pay does not interfere with this concept of "personal entitlement" inasmuch as the spouse's interest in the member's retired pay, under California law, is a nontestamentary community property right in the benefit extending only during the lifetime of the service member. His entitlement, as well as hers (and/or the community's) ceases upon the service member's death, in accordance with Congressional intention.[30]

V

LEGISLATIVE HISTORY OF RECENT CONGRESSIONAL ENACTMENTS SHOWS THAT CONGRESS HAS NOT MANDATED PRE-EMPTION, BUT RATHER HAS DEFERRED CONSIDERATION OF THE QUESTION

In order to find Congressional pre-emption of a state family law statute, it is essential to find that Congress actually considered—and reached some decision about—the issues involved in the judicial decision. *United States v. Bass, supra,* 404 U.S. 336, at 349.[31] It is from such actual legislative consideration that the "unambiguous Congressional mandate[32] is to be found, if at all.

The Congressional mandate of pre-emption may be express as in those instances where Congress has specifically

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[30]See discussion supra at Page 16-17.

[31]See Footnote 25, supra, and accompanying text.

[32]*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 146-7; *supra.* at Page 24.

stated who it wants to be the sole owner of the right or benefit or entitlement which is under question.[33] For example, in *Free v. Bland* (1962) 369 U.S. 663, Federal pre-emption was found on express Congressional mandate where regulations issued under statutory authority provided, *inter alia*, that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations . . ." 369 U.S. at 667, fn. 5, 6. The Congressional mandate, or the conflict between the two legislative schemes, may also be found by implication where the Congressional action regulating the right in question, while falling short of an express declaration of pre-emption, is so complete that it can be inferred that Congress intended to occupy the field. Thus, in *Hisquierdo*, this Court found pre-emption by the Railroad Retirement Act although nowhere in that Act has Congress specifically declared that the retiree and no other person would have any rights to the benefits in question. Notwithstanding the absence of an express declaration of pre-emption, it was found that the enactments that Congress has made, especially the limited spousal provision of 45 U.S.C. § 231d(c)(3) and the uniquely broad language of 45 U.S.C. § 231m, implied Congressional occupation of the field. Also significant in *Hisquierdo* was Congressional history indicating that Congress had specifically considered the extension of the spousal payment to a divorced spouse and rejected that proposal. 439 U.S. 572, at 585.

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[33]See generally, D. Shaver, *Community Property Division of Military Retired Pay: Will the California Supreme Court Retire Milhan?*, 11 Pacific Law Journal 1039, 1045-1050, for discussion of express vs. implied pre-emption.

Thus, it is apparent that a finding of pre-emption requires clear evidence that Congress has considered the specific question before the court. As discussed above, Congress has not enacted any express mandate of pre-emption with respect to military retired pay. In addition, those enactments that Congress has chosen to make are neither pervasive nor unambiguous such as would allow an implication of pre-emption similar to that in *Hisquierdo*. In fact, a review of legislative history of recent Congressional enactments requires the conclusion that Congress simply has not considered the question of whether military retired pay may be divided between husband and wife upon a dissolution of marriage.

It has been suggested that the 1975 and 1977 Amendments to 42 U.S.C. § 659, and 42 U.S.C. § 662(c) imply an intention by Congress that military retired pay be shielded from the application of any state laws. An examination of those Amendments and the legislative history surrounding them requires a conclusion that Congress, in making those amendments, did *not* address the question of divisibility of military retired pay. The 1975 Amendment was passed in order to enable attachment of all federal payments of wages or retirement benefits (including, *inter alia*, Railroad Retirement Act benefits and military retired pay) for the purpose of enforcement of the payee's child support and/or alimony obligations.[34] The 1977 clarifying Amendment ex-

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[34]42 U.S.C. § 659(a) provides, "Notwithstanding any other provision of law, effective January 1, 1975, monies (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States or the District of Columbia, (including any agency, subdivision, or instrumentality thereof) to

cluded community property settlements (as well as common law equitable distributions of property or other divisions of property between spouses) from the definition of "alimony" for the purposes of § 659.[35] Prior to the Amendments of §§ 659 and 662(c), no attachment was allowed of such government payments. Thus, the purpose of the enactments is not to restrict the operation of state family laws, but to facilitate such state laws.[36] The statutes carve out an exception to the traditional sovereign immunity concept derived from *Buchanan v. Alexander*, supra, 45 U.S. (1 How.) 20 (1846). If, as this Court implied in *Hisquierdo*, the concept of sovereign immunity in and of itself is insufficient to

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any individual, including members of the Armed Services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

[35]42 U.S.C. § 662(c): "The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with state law), includes but is not limited to, separate maintenance, alimony pendente lite, maintenance and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable state law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

[36]See generally S.Rep. No. 93-1356, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code, Cong. & Ad. News at 8157.

support pre-emption (439 U.S. 572, 585-6), it is difficult to imagine how the carving of an exception to the traditional doctrine, for the purpose of assisting the application of local state family laws, indicates an intention of federal pre-emption.

With respect to the 1977 clarifying Amendment to § 662(c), legislative is meager. No Congressional comment or explanation appears for the exclusion of property divisions from the scope of the Amendments, nor does any Congressional comment or legislative history clarify Congress' intentions as to the extent to which federal benefits may be affected by state family laws. *Hisquierdo*, supra, 439 U.S. at 587, fn. 20.

In connection with earlier legislation, Congress did discuss the question of attachment of military retired pay, and deferred any action in that regard in the hope that a uniform attachment provision for all federal entitlements would be passed instead.[37]

Following the 1975 and 1977 Amendments to § 659 and § 662(c), Congress did act specifically to make Civil Service pensions attachable in order to satisfy state community property settlements.[38] There is no indication in the Congressional Record that Congress discussed the question of military retired pay during consideration of the Civil Ser-

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[37]H.Rep. No. 92-481, 92nd Cong. 1st Sess., at 24 (1974).

[38]5 U.S.C. § 8345(j) (1) (1976 & Supp. II 1978). See generally S.Rep. No. 95-1084, 95th Cong., 2nd Sess.; 1978 U.S. Code Cong. & Ad. News 1379. See also 5 U.S.C. § 8346.

vice pension Amendment.[39] Coupled with Congress' earlier deferral of consideration of the question of military retired pay vis a vis community property divisions, Congress' continued silence with respect to military retired pay compels a conclusion that Congress is still deferring the question. In fact, as recently as May 28, 1980, it was the position of the Department of Defense that consideration of the issue again be deferred by Congress pending completion of a report by the President's Commission on Pension Policies, which Commission is in the process of studying federal pension and retirement programs and the question of the status of divorced spouses under such programs, with the apparent aim of eventual comprehensive Congressional action.[40]

The absence of any clear Congressional statement regarding the issue of whether the military pensions may be divided by a state court upon dissolution of marriage, taken together with the legislative history surrounding recent federal enactments governing various federal payments, indicate that Congress has never squarely discussed, addressed, or determined this issue. In the absence of an actual clear Congressional consideration of the issue, it is improper to imply a Congressional attempt to pre-empt

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[39]See generally S.Rep. No. 94-1350, 94th Cong., 2nd Sess. (1976) (CIS Index S363-40); 123 Cong. Rec. § 6722-S6728-S6772-S6773 (April 29, 1977).

[40]Summary statement of Major General R. Dean Tice, U.S.A. Deputy Assistant Secretary of Defense (Military Personnel Policy, before the Subcommittee on Compensation, Committee on Armed Forces, House of Representatives, on H.R. 2817, H.R. 3677, and H.R. 6270, May 28, 1980. Said Summary statement is set forth in full in the Appendix hereto.

state family law. Until such time as Congress does choose to fully address and discuss this admittedly complex issue, it is not for this Court to say that Congress intends pre-emption. Pre-emption appears only from Congressional statement, and not from Congressional failure to speak. The task of discovering Congressional intent is difficult enough when examining what Congress has done and said. When the examination addresses what Congress has not done or not said, it approaches divination.

VI

APPLICATION OF COMMUNITY PROPERTY LAW TO MILITARY RETIREMENT PAY DOES NOT DAMAGE OR INTERFERE WITH FEDERAL INTEREST; AND POLICY CONSIDERATIONS REQUIRE THAT NO PRE-EMPTION BE FOUND

As discussed above, the Congressional enactments establishing and regulating a system of military retired pay had not created a conflict with state community property laws. However, even if such a conflict did exist, as discussed above, a mere conflict is insufficient to require pre-emption. There is an additional requirement that a "state family and family property must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo, supra,* 439 U.S. at 581.

The clear and substantial federal interest herein is the interest in attracting and retaining personnel for military forces. That clear and substantial federal interest will not be impaired by allowing states to apply their com-

munity property laws to military retired benefits upon dissolution of the marriage of a military member or retiree.[41]

Congress has an interest in inducing young individuals to join and remain in military service for a significant period of time. In the creation of a system of military retired pay, Congress has created a rational and successful inducement.[42]

Military personnel, like civilians, ordinarily marry and have families. The nature of a military career demands both of the service member and of the service member's families certain sacrifices that a civilian career might not.

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[41]For that matter, neither is this clear and substantial federal interest compared by allowing non-community property states to apply their laws of marital property to military retirement interests.

[42]Certainly, Congress is not ignorant of the powers of financial incentives. The power of the inducement of the military retired pay system is especially apparent in the attraction to military service of that caliber of individual who typically becomes an officer: Talented, well-qualified, and well-educated individual; i.e., a professional such as Husband herein. Such individuals are those who are most likely to have the opportunity of lucrative careers in the civilian world. Certainly, the current military policy of generous deferred compensation in the form of military retired pay was intended to and does have a rule in inducing, for example, a young doctor to remain in military service for 20 years, foregoing for that period of time the career potentials of the civilian sector. For example, when the parties herein separated, Husband, after 18 years as a medical doctor, received a total monthly compensation of $2,596.51. It is not unreasonable to assume that Husband's knowledge that he would be eligible to retire with a full military pension at the age of 43 affected his and his families' decision to remain in the military.

For example, military families are frequently relocated. The children change schools. The spouse's career or employment is disrupted. For some, such as professionals, the salary may typically be lower than what that individual would earn in his civilian career. In many senses, not only the service member but the service member's entire family is in the military during the course of the service member's career.

If a state property law system, such as California's community property law, views a marriage as a partnership of Husband and Wife and considers the acquisitions of either to have been the result of that partnership, no federal interest is impaired by allowing that state to apply its laws to military as well as civilian personnel, to the extent such individuals may be properly within that state's jurisdiction. Such a result no more decreases the morale of the service member than an opposite result would decrease the morale of the service member's spouse, and thus, presumably the morale of the service member. There is no federal interest in creating disharmony between a military service member and spouse. There is no federal interest in creating a double standard such that two spouses standing before the same state divorce court will receive vastly different treatment simply because one chose to marry a civilian and one chose to marry a military man. There is no federal interest in creating a disincentive against marrying a military person. Certainly, if the morale of the military is a valid concern of Congress, it can be expected that Congress has an interest in military persons having normal family lives just as civilians do. Requiring that a military

person be subject to the same duties and obligations of marriage as a civilian does not harm the national security of this Nation.

Respectfully submitted,
LAW OFFICES OF WALTER T. WINTER

By WALTER T. WINTER
BARBARA R. DORNAN
Counsel for Appellee

(Appendix follows)

APPENDIX

5 U.S.C. § 8346a

§ 8346.

(a) The money mentioned by this subchapter is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

10 U.S.C. § 1402

§ 1402. Recomputation of retired or retainer pay to reflect later active duty

(a) A member of an armed force who has become entitled to retired pay or retainer pay, and who thereafter serves on active duty (other than for training), is entitled to recompute his retired pay or retainer pay upon his release from that duty as follows:

Col. 1, take—	Col. 2, multiply by—	Col. 3, subtract—
Monthly basic pay[1] of the grade in which he would be eligible— (1) to retire if he were retiring upon that release from active duty; or (2) to transfer to the Fleet Reserve or Fleet Marine Corps Reserve if he were transferring to either upon that release from active duty.	2½ percent of the sum of— (1) the years of service that may be credited to him in computing retired pay or retainer pay; and (2) his years of active service after becoming entitled to retired pay or retainer pay.[2]	Excess over 75 percent of pay upon which computation is based.

[1]For a member who has been entitled, for a continuous period of at least two years, to basic pay under the rates of basic pay in effect upon that release from active duty, compute under those rates. For a member who has been entitled to basic pay for a continuous

(Footnotes continued on following page)

However, an officer who was ordered to active duty (other than for training) in the grade that he holds on the retired list under former section 6150 of this title, or under any other law that authorized advancement on the retired list based upon a special commendation for the performance of duty in actual combat, may have his retired pay recomputed under this subsection on the basis of the rate of basic pay applicable to that grade upon his release from that active duty only if he has been entitled, for a continuous period of at least three years, to basic pay at that rate. If, upon his release from that active duty, he has been entitled to the basic pay of that grade for a continuous period of at least three years, but he does not qualify under the preceding sentence, he may have his retired pay recomputed under this subsection on the basis of the rate of basic pay prescribed for that grade by the rates of basic pay replaced by those in effect upon his release from that duty.

(b) A member of an armed force who has been retired other than for physical disability, and who while on active duty incurs a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under chapter 61 of this title, is entitled, upon his release from active duty, to retired pay under subsection (d).

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period of at least two years upon that release from active duty, but who is not covered by the preceding sentence, compute under the rates of basic pay replaced by those in effect upon that release from active duty. For any other member, compute under the rates of basic pay under which the member's retired pay or retainer pay was computed when he entered on that active duty.

[2]Before applying the percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

(c) A member of an armed force who—

(1) was retired for physical disability under section 1201 or 1204 of this title or any other law or whose name is on the temporary disability retired list;

(2) incurs, while on active duty after retirement or after his name was placed on that list, a physical disability that is in addition to or that aggravates the physical disability for which he was retired or for which his name was placed on the temporary disability retired list; and

(3) is qualified under section 1201, 1202, 1204, or 1205 of this title;

is entitled, upon his release from active duty, to retired pay under subsection (d).

(d) A member of an armed force covered by subsection (b) or (c) may elect to receive either (1) the retired pay to which he became entitled when he retired, increased by any applicable adjustments in that pay under section 1041a of this title after he initially became entitled to that pay, or (2) retired pay computed as follows:

Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
Highest monthly basic pay that member received while on active duty after retirement or after date when his name was placed on temporary disability retired list, as the case may be.	As member elects— (1) 2½% of years of service credited under section 1208 of this title;[1] or (2) the highest percentage of disability attained while on active duty after retirement or after the date when his name was placed on temporary disability retired list, as the case may be.[1]	Add amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based, if member is on temporary disability retired list.	Excess over 75% of pay upon which computation is based.

[1]Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

If, while on active duty after retirement or after his name was placed on the temporary disability retired list, a member covered by this subsection was promoted to a higher grade in which he served satisfactorily, as determined by the Secretary concerned, he is entitled to retired pay based on the monthly basic pay to which he would be entitled if he were on active duty in that higher grade.

(e) Notwithstanding subsection (a), a member covered by that subsection may elect, upon his release from active duty, to have his retired pay or retainer pay—

(1) computed according to the formula set forth in subsection (a) but using the rate of basic pay under which his retired pay or retainer pay was computed when he entered on active duty; and

(2) increased by any applicable adjustments in that pay under section 1401a of this title after he initially became entitled to that pay.

CHAPTER 371.—COMPUTATION OF RETIRED PAY

§ 3991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401

of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	3883 3884 3885 3886 3913 3915 3916 3919 3921 3922 3923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 3888 or 3927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	3911 3918 3920 3924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[4]		Excess over 75% of pay upon which computation is based.
C	3914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	3917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]		Excess over 75% of pay upon which computation is based.

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[1]For the purpose of this section, determine member's retired grade as if section 3962(c) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2]Compute at rates applicable on date of retirement.

[3]Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the high-

(Footnotes continued on following page)

§ 4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

§ 4803. As used in this part, "quasi-community property" means all real or personal property, whereever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

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est basic pay applicable to him while he so served, if such basic pay is greater.

[4]Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5]The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

§ 4603. Without filing a petition pursuant to Section 4503, husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interests of the children. Such order or decree may be modified or revoked at any time thereafter as the natural rights of the parties and the best interests of the children may require.

§ 4509. In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue.

§ 4801. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity and needs of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties.

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

(4) The duration of the marriage.

(5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.

(6) The time required for the supported spouse to acquire appropriate education, training, and employment.

(7) The age and health of the parties.

(8) The standard of living of the parties.

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have occurred prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may

be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

§ 5110. Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal repre-

sentatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or a assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyance, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

§ 5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children

which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

§ 5152. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

(b) It is in the interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subdivision (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

§ 5156.(1) A court which has jurisdiction under this title to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state.

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

(d) If the parties have agreed on another forum which is no less appropriate.

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 5150.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any

other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this title if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

SUMMARY STATEMENT
OF
MAJOR GENERAL R. DEAN TICE, USA
DEPUTY ASSISTANT SECRETARY OF DEFENSE
(MILITARY PERSONNEL POLICY)
BEFORE THE
SUBCOMMITTEE ON COMPENSATION
COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ON
H. R. 2817, H. R. 3677 AND H. R. 6270

MAY 28, 1980

Mr. Chairman and Members of the Committee:

I am Major General R. Dean Tice, the Deputy Assistant Secretary of Defense for Military Personnel Policy. Today, Colonel Aaron G. Dorough, the Director of Compensation and Mr. William R. Amis, the Assistant Director of Compensation, are accompanying me. If you have no objection, Mr. Chairman, I would like to submit my prepared statement for the record and summarize the major points for the Committee.

The subject being addressed in the three bills under consideration today involves the treatment of military retired pay during divorce. I realize this is a subject that lends itself to emotional considerations, personal viewpoints, and differing conclusions. Because of this, we have attempted to address the bills against some objective goals. First, we believe that any legislation should not place the government in a position of liability resulting from a divorce decree. Second, we believe that the decisions of a

state court should not be binding on the Federal Government with regard to individual rights. Also we believe it is important that the fact of military service should not be relevant in determining the rights between spouses. Obviously we believe that any legislation should be enforceable without administrative burden.

The divorce courts often consider military retired pay as an item of income or as community property, depending on the State laws, in the financial settlements of a divorce action. Military members, both active and retired, are subject to the rulings of the State divorce courts since the States exercise powers in domestic relations matters. Failure to comply with those decrees places members in violation of State law and subject to legal process. It has long been the Department's view that members are obligated by the terms of a divorce decree and are legally required to meet the financial settlements set out by the State domestic relations courts.

The entitlement of individuals under retirement or pension plans is of concern to the Administration. Recognizing that comprehensive national guidelines are needed, the President's Commission on Pension Policy was established, and legislation was enacted to complement the Commission's efforts. They are in the process of studying the Nation's pension and retirement programs and will be making their recommendations on appropriate measures that should be taken. It is our understanding that one area under study is the status of divorced spouses under pension programs, and that the issue will be included in their recommendations. When the Commission was being established, the President asked for a moratorium on piecemeal

liberalization in pension programs, except where essential. Consequently, we suggest that the Committee may wish to defer action on the pending legislation until we have the benefit of the Commission's study and recommendations.

A divorced spouse is not entitled to a portion of a member's retired or retainer pay. That compensation is paid as a result of performing military duty, or as recompense for the physical inability to perform the duties of military service resulting from injury or disease. However, in instances of divorce, there is an entitlement for a divorced spouse under the social security system. Since 1957, military service has been covered employment, and members are full participants, as are other wage earners. Under that system, benefits are provided for a divorced wife, a surviving divorced wife, and a surviving divorced mother. Entitlement, and the resulting benefits, are based on the wage earners covered employment which determines the Primary Insurance Amount and the benefit level. Because of the military participation in social security, unlike other major federal personnel systems, the divorced spouse of a military member does have entitlement status for social security benefits which other divorcees of federal employees may not have.

Against this background, I would like to discuss briefly the three bills under consideration.

H. R. 2817 would establish an entitlement status not specifically related to the performance of military duties. A divorced spouse of a member would be independently entitled to a portion of military retired or retainer pay by virtue of marriage. Additionally, entitlement would be

extended to a portion of the Survivor Benefit Plan annuity. As proposed, the bill does not incorporate amendments made in the Survivor Benefit Plan by the enactment of Public Law 95-397. Also, the bill appears to establish a perpetual annuity entitlement notwithstanding whether a remarriage occurs before or after age 60. The integration of SBP annuities with Dependency and Indemnity Compensation payments also is interrupted. Although social security integration is preserved, the bill does not include the exemption feature enacted as a feature of Public Law 95-397. Because of the integration offset feature in the SBP, it is possible that neither a spouse or former spouse would receive any of the SBP annuity since the offset would be applied against the divided annuity. Enforcement of this legislation would be extremely difficult. We would be required to establish new administrative, accounting, and pay systems to identify, validate and execute payments. Such systems would be subject to multiple variables, such as remarriage status, age, address changes, VA entitlement status, social security entitlement status, and interpretations of State laws. With these considerations in mind, and the fact that the President's Commission on Pension Policy is addressing the status of divorced spouses, the Department of Defense does not believe that the bill should be favorably considered at this time.

H. R. 3677 and H. R. 6270, unlike H. R. 2817, does not establish an entitlement status. Its provisions are similar to the features of Public Law 95-366. Under these bills, the Secretary concerned would be authorized to comply with the terms of a court determination terminating a domestic relation. The provisions apply to members of the armed

forces, rather than members of all the uniformed services. Additionally, H. R. 6270 provides certain operating procedures and requires the issuance of implementing regulations.

Mr. Chairman, we have no objection with these bills, however, we do have some technical problems with the legislative language. We would be glad to work with your staff to resolve these concerns. Our concerns are on the dissimilar treatment of retired or retainer pay depending upon the form of financial determinations made by the courts—garnishment for alimony and child support vs. financial settlements in a divorce decree. Another concern involves amounts of retired pay waived for the award of VA disability compensation. Our final concern centers around the lack of authority to establish uniform procedures for the execution of payments under H. R. 3677 since other laws require other deductions or limits the amount of pay subject to process. My statement for the record elaborates on these concerns. Although we have objection to H. R. 3677 and H. R. 6270, we believe that H. R. 6270 is more complete assuming the limitations and exclusions set out in other law and other statutes apply.

Mr. Chairman that concludes my summary, and I would be glad to answer your questions.

No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLANT'S REPLY BRIEF

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
332 Pine Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 421-1100
Counsel for Appellant

February 19, 1981

BOWKE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLANT'S REPLY BRIEF

Husband replies to arguments raised in the Wife's brief in opposition and, selectively, to objections raised in each of two amicus briefs.

I. Re the war powers of the Congress

The federal enactments here at issue are grounded in the war powers of the Congress, principally Art. I, Sec. 8, Cl. 12 of the Constitution—the power "to raise and support armies."[1] Because of this source of power the preemption argument is here stronger than in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979), where preemption was found in a conflict between federal law grounded in Commerce Clause considerations and California's community property scheme. Different and stronger policy considerations apply, requiring a greater degree of uniformity in application, when the federal legislation derives its authority from the war powers of the Congress.[2]

The war powers lie exclusively with the Congress.[3] The power exists in peacetime as much as in war.[4] The emphasis is equally on the "support" of armies as upon raising them;[5] and the authority to "support" includes compensa-

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[1]Other provisions in the Constitution furnish the Congress and the President with supplemental powers to meet the varied demands of war. The Preamble refers to the desire of the people to "provide for the common defense." In Article I, Sec. 8, the Congress is assigned the power to "provide for the common defense"; "to declare war"; to provide and maintain a navy; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. In Article II, § 2, Cl. 1, the President is designated Commander in Chief of the Army and Navy of the United States. See, *Lichter v. United States,* 334 U.S. 742, 744 n. 3 (1948).

[2]*Peel v. Florida Dept. of Transp.,* 443 F.Supp. 451, 458 (N.D. Fla. 1977), aff'd 600 F.2d 1070 (5th Cir. 1979).

[3]*United States v. Tarbel,* 80 U.S. 597, 600 (1872).

[4]*Houze v. United States,* 272 F.2d 146, 148 (9th Cir. 1959); *Bertelson v. Cooney,* 213 F.2d 275, 276-77 (5th Cir. 1954).

[5]*Lichter v. United States,* 334 U.S. 742, 755-56 (1948).

tion to be accorded to Army members.[6] When the Congress passes legislation under such constitutional authority, it is exercising its supreme power. "When [this power] is in action it is transcendent;"[7] "broad and sweeping;"[8] and necessary for "the protection and preservation of the nation itself."[9] Other constitutional rights are subordinated to the war powers.[10] Implied exceptions to an act of Congress grounded in such authority will not be recognized.[11]

Here, California may have a Tenth Amendment interest in regulating the domestic relations between husband and wife of domiciliaries within its borders. But that interest

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[6]"[The Congress] can determine, without question from any state authority, . . . the age at which the soldier shall be received, and the period for which he shall be taken; the compensation he shall be allowed. . . . No interference with the execution of this power of the National Government . . . by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." *United States v. Tarble,* 80 U.S. 597, 599-600 (1872).

[7]*Saint Johns River Shipbuilding Co. v. Adams,* 164 F.2d 1012, 1015 (5th Cir. 1947).

[8]*United States v. O'Brien,* 391 U.S. 367, 377 (1968); *Lichter v. United States,* 334 U.S. 742, 755-758 (1948); *United States v. Boardman,* 419 F.2d 110, 112 (1st Cir. 1967), cert. denied, 90 S.Ct. 1124 (1970).

[9]*Clay v. United States,* 397 F.2d 901, 912 (5th Cir. 1968).

[10]War powers prevail over a state's Tenth Amendment contentions, *United States v. Oregon,* 366 U.S. 643, 649 (1961) ("Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power."); over Tenth and Eleventh Amendment rights, *Peel v. Florida Dept. of Ed.,* 600 F.2d 1070 (5th Cir. 1979); First Amendment rights, *United States v. O'Brien,* 391 U.S. 367 (1968); *Jennings v. Illinois Office of Ed.,* 589 F.2d 935, 936 (7th Cir. 1979). *See,* also, *United States v.* MacIntosh, 283 U.S. 605, 622 (1931).

[11]*Case v Bowles,* 327 U.S. 92, 102 (1946).

is slight as applied to the pay of Army members. Unlike the retirement benefits of railroad workers in *Hisquierdo,* who were employed by *private* railroad employers, we are here dealing both with the pay of Army members in active service and the retired pay of Army retirees subject to recall—all paid directly by the Congress.

There is no argument that an essential function of State government is here involved; and even if that were so, where war powers are involved the "states' power . . . must be in subordination to the power of Congress . . . in order to carry on war."[12]

> "[I]t was never intended to limit the war powers of Congress nor its right to exact public service from all when necessary to meet the public need, Congress being the sole judge of the necessity and extent thereof. [Citation omitted.] Congress is expressly authorized to declare war and to provide for the common defense. These powers necessarily carry with them the power to say who shall serve in the armed forces, and in what circumstances."[13]

Because exercise of the war powers is exclusive to the Congress, the only question here involved is whether the Congress deferred to state community property principles in legislation relating to Army pay; or, more particularly, whether the Congress accommodated the creditor interest of an ex-spouse claiming a property interest in the husband's Army retired pay, when the Congress protected the pay of Army officers and enlisted men in 37 U.S.C. §§ 701 (a) and (c), as modified by 42 U.S.C. §§ 659(a) and 662(c).

There is no recognition of state community property principles in any statute of Congress relating to Army pay. Accordingly, Congress did not so defer to California.

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[12] *Id.* at 100.

[13] *Bertelson v. Cooney,* 213 F.2d 275, 276-278 (5th Cir. 1954).

II. Re implications which attend a conclusion that an ex-spouse has a true property interest in the husband's army retired pay

The Wife (br. 16) and Amici (Memb.Cong. 38-39) challenge Husband's contentions.

(1) Husband argued that a consequence of allowing an ex-spouse to claim an interest in the Army retired pay would be to allow the ex-spouse to transfer her property by testamentary disposition. In *Miller v. Miller,* 609 P.2d 1185 (Mont. 1980), cert. petition docketed (1980), the Court had one issue before it:

> The decree provided that the wife's share in the pension should be paid monthly as it was received by the husband. Furthermore, it provided that in the event the wife predeceased her husband, that the pension should pass to her estate.
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> • • • • •
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> [T]he husband argues that it was error for the trial court to rule heirs of the wife could inherit her interest in the military pension. We find no basis to distinguish the wife's interest from other marital assets which may be distributed by the trial court. . . . The court order provides the wife's share in the husband's retirement will be taken out of his monthly payments as he receives them. The husband's obligation lasts only so long as he continues to receive government retirement benefits. Thus, the heirs of the wife can share in these benefits only while the husband is living. We affirm the trial court's order in this respect.[14]

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[14] *Russell v. Russell,* 605 S.W.2d 33 (Ky.App. 1980) held that federal law preempted Kentucky from finding that Army retired pay was divisible at divorce. The opinion addressed the issue of testamentary disposition as follows (605 S.W.2d at 36):

> We cannot rewrite the federal statutes to permit military retirement pay to become a property right of ex-spouses. If we could, a portion of the retirement pay could be awarded to the divorcing spouse and become that person's absolute property. If that person remarried and predeceased the re-

Ultimately, it is not important whether California law coincides with that of Montana in acknowledging the right of the ex-spouse to make a testamentary disposition of her property interest in the husband's Army retired pay. California might well adopt the Montana conclusion. The larger issue is, rather, whether the Congress has left the matter to California to decide. If it has not, the current coincidence between the result under Federal law and the result obtained by California pursuant to its peculiar state law property concepts is irrelevant. In these circumstances, "coincidence is as ineffective as opposition."[15]

(2) Husband contended (brief 32-33) that if an Army member refused to retire after becoming obligated to do so and insisted upon continuing his Army service, an ex-spouse might well have a claim against him under California law for depriving her of her property right.

In re Marriage of Luciano, 104 Cal.App.3d 956, 164 Cal. Rptr. 93 (1980), the ex-spouse complained that the California divorce decree allowed her former husband to determine when he might retire from the Air Force. The ex-spouse contended *she* should have the right to determine when she would begin to collect her property interest in the husband's retired pay and that it should not matter whether the husband chose to retire from the military.

The Court of Appeal agreed. It determined that the ex-spouse need not wait to collect her interest in retired pay until the husband actually retired.[16] The Court further

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tiree, the absolute property right would continue to that person's heirs or designated beneficiary. Such a result is totally inconsistent with the intent and the provisions of the federal statutes.

[15]*Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956). See, Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal.St.Bar Jour. 13, 89 (1973).

[16]"[W]e conclude and hold that the trial court abused its discretion in providing that Dorothy must wait until Ferdinand actually retires before commencing to collect her share of the pension. To uphold the trial court's ruling as to the

noted that the trial court could not adjust alimony to the ex-spouse in exchange for allowing the Air Force officer the right to determine when he wished to retire. The Court concluded that the trial court should issue an order "that the non-employee spouse is the one who has a choice as to when his or her share of the pension [i.e., Air Force retired pay] shall begin. This election can be made at any time after the pension is matured by motion in the trial court by the non-employee spouse."[17]

(3) Husband argued (br. 34-35) that since an ex-spouse armed with a community property award is a creditor, her divorce award acknowledging her property right in the husband's army retired pay would propel the former member to march from the divorce court to the federal courthouse to seek relief in bankruptcy.

In *Ramsey v. Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975), the divorce court acknowledged a property interest in the wife in the husband's Army retired pay. Less than four months after the judgment was entered against him in Idaho, the husband filed for relief in bankruptcy in the Northern District of California. Relief was granted and the debt to the ex-spouse discharged. *Ramsey v. Ramsey,* 612 F.2d 1220 (9th Cir. 1980).

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time Dorothy is to commence receiving her portion of this community asset would give Ferdinand the option of determining the receipt by Dorothy of her own property which would be basically unfair. The employee spouse cannot by election defeat the non-employee spouse's interest in the community property by relying on a condition solely within the employee spouse's control." 164 Cal.Rptr. at 95.

[17]The *Luciano* case has been followed and expanded upon in the more recent case of *Gillmore v. Gillmore,* 113 Cal.App.3d 319, 169 Cal.Rptr. 811 (1980). There, the Court held that a husband who refuses to retire must pay damages to the ex-spouse in an amount equal to what she would have received as her property had he retired. The Court rejected the husband's defense that such a result forced the husband to retire when he did not wish to do so. The ex-spouse's property interest in the husband's retirement benefits constituted a consideration more worthy of state protection.

III. Re policy considerations which illuminate and ultimately determine the central issues

Because the Federal enactments rest upon the war powers of the Congress, national interests are here to be promoted. These national interests require uniformity of result throughout the states.

A. Attracting and retaining career Army personnel

The Army retiree must have control of his retired pay even more so than the railroad worker considered in *Hisquierdo*. For, without such control, the basic Congressional objective—to get people to volunteer for, remain in, and then leave the Army in the middle of their careers—will be difficult to achieve. For obvious reasons, it is far more difficult to achieve such personnel objectives with respect to career recruitment for Army service than for other occupations.

The Army member must reside where the Army sends him. Whether his retired pay is reduced drastically thus depends on whether he (or his spouse) happens to be located in one of the eight community property states at the time of divorce. The incentive to remain or to leave the Army in 20 years should not depend on this fortuitous fact. The result should be uniform. Drastically reducing the incentive depending upon the place of assignment at the time of divorce is not consistent with underlying Federal objectives.

There is a greater need for high retirement incentives offered to the Army officer than to the railroad worker in *Hisquierdo*. But it is difficult to attract individuals to an Army career, when Army pay lags significantly behind pay in private industry.[18] This situation is aggravated by mandatory retirement provisions after 20 years.

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[18]Pay for military personnel has notoriously lagged behind that of private industry—even in an all-volunteer Army. This has always been the case and is likely to continue. See, e.g., Griffiths, "Retention of Highly Trained Poses Serious Problem," *Aviation Week & Space Technology* 42 (Nov. 5, 1979). Griffiths, "Retaining

There is an element of potential danger associated with an Army career which cannot be ignored. There is more discipline in the Army and less freedom than in other occupations. There is the certainty of being transferred from place to place, interfering with normal home life. There is the possibility of recall to active service after retirement, just when a start has been made by the retiree in a civilian job or in his own business. All in all, the *only* economic factor as to which Army life may be superior is retired pay. And this relates to the serviceman and not to his spouse. It is he who must want to remain in the service for 20 years (and usually no longer).

It may be overreaching to claim that the retention in the service of trained and experienced Army members is more important to the national government than the retention of civil service personnel. But Army personnel are essential to the welfare of the nation. The difficulty in enlisting and retaining sufficient numbers of qualified people for the Army makes it *more* important that such personnel have additional retirement incentives than civil service personnel.

B. Providing subsistence to the Army retiree as a matter of national pride

A second purpose of retired pay must be to assure the financial solvency of the Army retiree and to provide for him at least at a subsistence level. Men who have served their 20 years in the Army and who, upon forced retirement, are left without means, without training for a civilian job, or hope become dangerous to the nation. Most importantly, a nation cannot take pride in its armed forces if retired members of its army must line up for food stamps.

C. Perceptions of fairness

To recruit and retain career volunteers into the Army it is not sufficient that the retirement system be fair; it must

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Skilled Keyed to Quick Fixes," *Aviation Week & Space Technology* 43, 45 (Nov. 19, 1979). Benefits help bridge the gap.

also be perceived by Army members to be fair. The morale of Army members depends upon such perception.

From the perspective of the Army member, numerous injustices attend the division of his retired pay at the time of divorce. These injustices may precede the divorce, but are related to the division of the expected retired pay.[19] Unfairness may be perceived when, after divorce, the Army member advances with promotions and increased pay, only to share the incremental benefits with his ex-spouse;[20] when the ex-spouse can transfer her interest in the retired pay by testamentary disposition to strangers; when the ex-spouse can compel the Army member to resign so she can collect her property interest; when the ex-spouse can collect

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[19]*E.g.*: In contemplation of a possible future divorce action, the spouse of the Army member encourages the husband to seek a transfer to a community property state; or, if the husband is stationed abroad, she moves to California, establishes domicile, and starts counting the money she will make from her new property interest thus acquired. Indeed, her new property interest may precipitate the divorce, since now the spouse has options that her new asset has brought her that she did not have before.

It is no answer in this regard to suggest the husband retain his former domicile. Before a divorce court in a community property state, estoppel to assert a foreign domicile may easily be found; and the domicile within the state of only the spouse may block the husband. *Cf. See*, the opinion of the Court of Appeals in this case, J.S. 50-53. In any event, the Army member would need constant legal advice, with every Army transfer, to forestall forfeiting part of his retained pay every time a matter possibly affecting a change in domicile might arise.

[20]The amount of retired pay relates to rank and active duty pay. Assume the marriage lasted 10 years so that the ex-spouse is entitled to one-quarter of the retired pay. If after divorce the Army member secures increases in rank and pay, he increases the amount of his retired pay. But the increase benefits the ex-spouse in part because her interest is determined solely by reference to the longevity of the marriage.

The same analysis applies if the retiree after divorce is recalled to active duty and as a consequence of such recall becomes entitled to greater retired pay.

Army retired pay from each of two Army retirees, whom she might marry in succession.[21]

Fundamentally, however, the greatest concern lies with the unfairness which the Army member perceives when he states that it is he, after all, who trained for and engaged in combat, risked death, suffered in the Army—and not his ex-spouse, who stayed back home. And it is he to whom the Army promised the retired pay and not to his ex-spouse.

D. Recall and defense-posture readiness

The California Supreme Court dismisses the possibility of recall as a remote possibility, one that deserves little consideration in the implementation of state policy concerns.[22] A policy concern of the Congress, however, is to establish and implement a manpower call-up system that allows the President—without further Congressional action —immediately to summon former Army members to active duty.

No matter what may be his post-Army activity or personal situation, the former member is liable to recall "at any time." The Congress reaffirmed this obligation of the former member as recently as December 12, 1980, with the enactment of P.L. 96-513, 94 Stat. 2868, the Defense Officer Personnel Management Act. The Act repeals certain older recall statutes and substitutes a new, comprehensive provision (to be collated as 10 U.S.C. § 688). Section 688(a) provides:

> "Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the

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[21]A spouse divorcing after 10-20 years of marriage to an Army member may remarry another and acquire a new property interest in her second husband's Army retired pay. Indeed, she might wind up with more retired pay than either husband.

[22]*In Re Marriage of Fithian*, 10 Cal.3d 592, 604, 111 Cal.Rptr. 369 (1974).

> military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.[23]

The Army is currently upgrading and modifying plans to use the retired member as an important personnel resource.[24]

The Congress determined that imposing the risk upon the former member of recall into active service at any time that the Secretary so orders justifies paying him retired pay. It is he who will be recalled and not his ex-spouse. And although the United States now has an all-voluntary Army, the recall statute is conscriptive as to the retiree.

It is for the Congress to raise the Army and to determine the means to do it. It is not for California to promote

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[23]This new provision eliminates the limitation on the President's authority, found in 10 U.S.C. §§ 6481 and 6482, to recall retired enlisted members of the regular Navy or Marine Corps to active duty only in time of war or national emergency. It places the functional authority to order a recall at the level of the Secretary of each military department; and it prescribes that uniform regulations shall spell out detailed procedures. See H.Rpt. No. 96-1462, 96th Cong., 2d Sess. (Nov. 13, 1980), pp. 80, 107-108.

[24]*Army Echoes*, an authorized Army periodical which addresses Army retirees, routinely publishes information concerning developments in the Army recall program. In the May/June issue, vol. XXIV, No. 3, retirees were told about a new "retiree mobilization test program." The September/October 1980 issue, vol. XXIV, No. 5, states that a major revision is forthcoming to Army Regulation 601-10 relating to the mobilization of retired Army members. Retirees are also given information concerning legislation being proposed by the Army to include retirees in mobilization preassignment plans. The November/December issue, vol. XXIV, No. 6, page 4, states that under the retiree mobilization program eligible retirees "with health care or administrative skills [and] residing within 90 miles" of an Armed Forces Examining and Entrance Station are currently being identified for positions that would need to be filled during mobilization.

its value system, through the machinery of its courts, in destructive opposition.

IV. Re § 701(a)

The Wife contends (br. 34) that 37 U.S.C. § 701(a) is an "assignment" rather than an "anti-assignment" statute because the text establishes no prohibition. In the alternative, she asserts § 701(a) applies only to voluntary assignments; the provision does not bar the attachment of Army pay by creditors. These arguments are devoid of merit.

A. Decisional law and prior formulations of § 701(a) make clear the broad scope of the provision as a severe anti-assignment limitation

Statutory authorization in § 701(a) to an Army officer that he may assign his pay "when due and payable" prohibits the anticipation of such pay by assignment before the pay actually becomes due and payable. "Due and payable" appears in commercial instruments and signifies that "the obligation to which it is applicable is then immediately payable."[25]

It is of no assist to an ex-spouse to focus at the time of divorce on funds which will become due and payable to the husband only after the divorce, as his Army retired pay. It is the essence of the divorce decree awarding the spouse a property interest in the husband's *future* retired pay that it anticipates the payment and divides it before the pay has become due and payable.

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[25] "Here, the word 'due' is coupled with the phrase 'and payable'. 'The word payable, when used in connection with commercial transactions, means that which is to be paid rather than that which may be paid.' [Footnote omitted.] We think there can be no doubt, unless the context clearly indicates a contrary meaning, that the phrase 'due and payable' on a specified date means the debt or obligation to which it is applicable is then immediately payable." *Furrow v. C.I.R.*, 292 F. 2d 604, 607 (10th Cir. 1961).

Two state courts which have been asked to construe § 701(a) have given it a strong anti-assignment reading.[26] The Ninth Circuit construed § 701(a) to mean that an assignment can be given effect only when the retired pay "would ordinarily become 'due and payable' in the first instance and not after becoming 'due and payable' as a result of subsequent litigation."[27]

A broad anti-assignment reading is compelled by an examination of the early predecessors to § 701(a). The earliest version which gained Congressional sanction traces back to an 1866 enactment, 39 Stat. 337, 338 (Act of July 28, 1866). There, the Congress ordered that the "Regulations of 1863" (prepared by the then Secretary of War, with the approval of the President) be enforced until the Congress should otherwise direct.[28] These Regulations provided:

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[26]"The right to . . . the retired pay not yet due and payable cannot be assigned, sold, transferred, conveyed, or pledged. *See* 37 U.S.C. § 701(a); 6 C.J.S. *Assignments* § 21." *In Re Marriage of Ellis*, 36 Colo.App. 234, 236, 538 P.2d 1347, 1349 (1975), aff'd 191 Colo. 317, 552 P.2d 506 (1976). *Accord: Fenney v. Fenney*, 537 S.W.2d 367 (Ark. 1976).

[27]*Smith v. Commanding Officer*, 555 F.2d 234, 235 (9th Cir. 1977). In *United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968), the Court called the right of the husband to the Army retired pay an "unassignable federally created statutory right." "Moreover, *no serviceman* may assign his pay in advance of the date it becomes due and payable. 37 U.S.C.A. §§ 701(a) and (c). State law, of course, cannot be superimposed upon or take precedence over federal statutes and regulations."

There does not appear to be any case law authority to the contrary. It is surprising that in all the state court decisions in community property states no mention of §§ 701(a) or (c) appears. The explanation for this phenomenon in the divorce context lies in the circumstance that until *Hisquierdo* negated the doctrine, community property states took the position that the ex-spouse claims as an owner and not as a creditor. In light of *Hisquierdo*, the Wife makes no such contention in this case.

[28]The references to these Regulations of 1863 and to the statute appear in 15 Op.Atty.Gen. 271, 272 (1877). The statute mandated the preparation and submission of a report and then stated that "The existing regulations to remain in force until Congress shall

> "No officer shall pass away or transfer his pay-account not actually due at the time, and when an officer transfers his pay account he shall report the fact to the Paymaster-General and to the paymaster expected to pay it."[29]

In this predecessor to § 701(a) the anti-assignment prohibition is stated directly and without any implied negative. The current version of the formulation does not alter the core of the prohibition by phrasing the limitation in terms of permission to assign when the pay is "due and payable."

The prohibition against assignment of an officer's pay was published as an Army regulation at least 15 years before California entered the Union.[30]

B. Section 701(a) bars the attachment of Army retired pay

It has long been understood that Army retired pay cannot be attached.[31] It does not matter that the original basis for such a conclusion was grounded in sovereign immunity considerations. As a practical matter, an ex-spouse cannot attach Army retired pay to enforce a property right which she claims in such pay unless the federal government has consented to such an attachment—and it has not so consented. This conclusion has been reinforced by the 1775 and 1777 amendments to the Social Security Act, 42 U.S.C. §§ 659(a) and 662(c).

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have acted on said report." By 1877 the Congress had not so acted, since the Attorney General stated in his opinion that by virtue of the 1866 enactment the 1863 Regulations had acquired "the force and effect of law."

[29] *Id* at 273.

[30] The 1835 Regulations of the Secretary of War provided that "Officers shall not pass away or transfer their pay accounts for any amount not actually due at the time." The text is quoted in 15 Op.Atty.Gen. 271, 273 (1877).

[31] *Buchanan v. Alexander*, 45 U.S. 20 (1846); *Applegate v. Applegate*, 39 F.Supp. 887 (E.D.Va. 1941); *Cf.* 23 Comp.Gen. 911 (1944).

In light of this supervening barrier to attachment, it makes no sense for the Wife to argue that the key element in an anti-assignment statute is not whether it "anticipates" the benefit, but whether it bars attachment.[32]

Anti-attachment attributes to an anti-assignment statute are in any event implied. The *Hisquierdo* court noted that anti-assignment provisions generally serve to ensure that the benefits created by the Congress actually reach the targeted beneficiary.[33] Here, no less than in § 231(m) considered by *Hisquierdo,* the anti-assignment statute "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of Congressional policy." 439 U.S. at 584.

Even under California law, it is understood that a statute that makes retirement benefits non-assignable restricts both voluntary and involuntary alienation.[34]

C. When it enacted the 1907 predecessor to § 701(a), the Congress intended to invalidate claims by the assignee against the assignor

The general anti-assignment provision, 31 U.S.C. § 203, generated several early decisions that the prohibition against assignment goes beyond rendering the assignment void as against the debtor; the prohibition also invalidates all legal and equitable claims between assignor and as-

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[32]To the extent railroad retirement is at least in part contributory in nature and railroad employers private organizations, it made cautionary sense for the Congress to provide in § 231m of the Railroad Retirement Act, 45 U.S.C. § 231m, that benefits may not be attached. As for Army retired pay, there is no contributory element; there is no private employer; and a specific anti-attachment provision is redundant when the Congress has not otherwise consented to a garnishment suit.

[33]*Hisquierdo v. Hisquierdo,* 439 U.S. at 584, citing *Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973); and *Wissner v. Wissner,* 338 U.S. 655 (1949).

[34]"Nonassignability . . . operates as a defense against creditors." *Ogle v. Heim,* 69 Cal.2d 7, 14, 69 Cal.Rptr. 579, 583, 442 P.2d 69 (1968).

signee.[35] These decisions must have formed the context and conceptual background within which the early predecessors to the current § 701(a) were adopted and understood.[36] There is no reason to believe the Congress intended a result different from that declared for § 203 to govern claims covered by the predecessor to § 701(a).[37]

D. The sweeping scope of § 701(a) is implied in its applicability to active duty pay

Section 701(a) protects both active duty as well as retired pay. The "pay" in § 701(a) is specified in 37 U.S.C. § 101(21) as including "basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay." Accordingly, the pay of the Army retiree in peacetime is no less protected by § 701(a) than the pay of the active duty officer in time of war.

The Congress has been careful to protect the serviceman in time of war against the claims of creditors.[38] The notion

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[35]*National Bank of Commerce v. Downie*, 218 U.S. 345 (1910); *Nutt v. Knut*, 200 U.S. 12 (1906); *Spofford v. Kirk*, 97 U.S. 484 (1878).

[36]No reason appears why § 203 should not apply directly to bar the claim of an ex-spouse in Army retired pay. See, 15 Op.Atty.Gen. 270 (1877). The text of the Act would appear sufficiently broad in scope to apply.

[37]The standard of 31 U.S.C. § 203, making assignments "void", is the standard also set out in 37 U.S.C. § 701(c), making assignments by enlisted men "void." There is no indication that the Congress intended a lower degree of protection to attend retired pay targeted for an officer as opposed to an enlisted man (prior to the pay of an officer becoming due and payable). Without a rational purpose for such a distinction, a conclusion that the ex-spouse of an officer may enforce a state award for an interest in the husband's Army retired pay, while the ex-spouse of the enlisted man cannot, would be open to Due Process challenge.

[38]See Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1128, 50 USC App. §§ 510-536. Section 510 states it is the "requirements of the national defense . . . to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States."

that the Congress accommodated involuntary attachment in § 701(a) of an officer's active duty pay in time of war is a construction of the section which would do damage to clear national interests. The taking of Army pay by a creditor of an officer should not be allowed as an implied exception to § 701(a). Implied exceptions are disfavored where the Congress has acted under its War Powers.

E. When the early predecessors to § 701(a) were enacted, an anti-assignment statute covering specified property would have been understood as barring a claim by an ex-spouse for her community property share in that property

When the Congress raised the Regulations of 1863 into law (by statutory approval in 1866) and when it enacted the 1907 predecessor to § 701(a), an ex-spouse in California did not have a vested interest in community property. Legal title to the community property was in the husband. He alone controlled the property and the spouse had "no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than by her own death."[39] That possible interest was not the "present and existing" interest in community property which Civil Code § 5105 now declares. The interest of the spouse was changed and became equal, present and existing during the marriage only when the predecessor to § 5105 was enacted in 1927.[40]

Until 1927, the spouse's possible interest during the marriage was a mere expectancy. Upon death of the husband, she took as an heir and paid inheritance taxes. Most importantly, upon divorce she took her community property interest by assignment of title to the property by the husband or judicially mandated assignment.

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[39] *Estate of Burdick*, 112 Cal. 387, 44 P. 734, quoted in *Stewart v. Stewart*, 199 Cal. 318, 331 (1926).

[40] That predecessor to § 5105 appeared as § 161a, added by Cal. Stats. 1927, c. 265, p. 484, § 1.

That the wife had to take her interest by assignment leaves no doubt that the anti-assignment texts of the 1866 and 1907 predecessors to § 701(a) barred the claim of an ex-spouse in the husband's Army retired pay. Although California law changed following the 1927 Civil Code amendments, there is no indication that § 701(a) was altered by the Congress to keep conceptual tandem with changes in California law concerning the present and existing interest of a spouse during the marriage in community property.

V. Re other matters as to which the wife errs

A. Contrary to Amici (NOW 16), the trend of state decisions after *Hisquierdo* has been against division of Army retired pay.[41] Even before *Hisquierdo* several states had already determined that an ex-spouse had no property interest in the former member's retired pay.[42]

B. Decisions favoring divisibility of retired pay are not of ancient vintage. They have all come down since the husband joined the Army.[43] Indeed, the flurry of pen-

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[41]*See, Hill v. Hill,* .... Md. ...., ... A.2d .... (Md.Ct. App., No. 1636, decided Jan. 7, 1981), opinion reproduced in 7 Fam.L. Rptr. 2173 (Jan. 27, 1981); *Hiscox v. Hiscox,* 385 N.E.2d 1166 (Ind.App. 1979); *Russell v. Russell,* 605 S.W.2d 33 (Ky.App. 1980); *Light v. Light,* 599 S.W.2d 476 (Ky.App. 1980); *Paulsen v. Paulsen,* 601 S.W.2d 873 (Ark. 1980); *Cose v. Cose,* 592 P.2d 1230 (Alaska 1979) cert.pet. docketed, 100 S.Ct. 2149; *Baker v. Baker,* 421 A.2d 998 (N.H. 1980). *Cf., Arrambide v. Arrambide,* 601 S.W.2d 197 (Tex. Civ.App. 1980).

[42]*Ellis v. Ellis,* 36 Colo.App. 234, 538 P.2d 1347 (1975), aff'd 191 Colo. 317, 552 P.2d 506 (1976); *Fenney v. Fenney,* 537 S.W.2d 367 (Ark. 1976); *Savage v. Savage,* 374 N.E.2d 536 (Ind.App. 1978); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976); *Baker v. Baker,* 546 P.2d 1325 (Okla. 1975).

[43]*In re Marriage of Fithian,* 10 Cal.3d 592, 517 P.2d 449, cert. denied, 419 U.S. 825, established the doctrine in California only in 1974. In Texas, three appellate decisions held that retired pay was a mere expectancy and hence not divisible as a community property asset upon divorce. *Bright v. Bright,* 531 S.W.2d 440 (Tex. Civ.App. 1975); *Lumpkins v. Lumpkins,* 519 S.W.2d 491 (Tex.

sion cases in California involving public employees began only with a 1949 legislative change, which, by implication, approved the divisibility of state government pensions.[44]

C. Federal tax decisions do not represent Congressional acceptance of the divisibility of Army retired pay. The arguments of Amici (NOW 19-20) are inapposite:

> "State law may control only when the Federal Taxing Act, by express language or necessary implication, makes its own operation dependent upon state law."[45]

In each of the cases noted in the Amicus brief, this was the case.

D. The Wife's jurisdictional objections are wide of the mark. It appears directly from the opinion of the California Court of Appeals that the state's community property laws, as applied to the Husband's retired pay, were drawn into question as repugnant to the federal scheme of military retirement benefits, and the decision of the Court was in favor of the validity of these laws. J.S. 57. The specific state statute is identified in the opinion as Civil Code § 4803 which establishes the regime of quasi-community property. J.S. 46-47. When the question of validity of the statute appears to have been actually considered and decided by the state court, it is not necessary to inquire how and when the question of the validity of the statute was raised.[46]

Civ.App. 1975); *Davis v. Davis*, 495 S.W.2d 607 (Tex.Civ.App. 1973). Only in 1976 did the Texas Supreme Court disapprove these decisions and hold retired pay divisible in *Cearley v. Cearley*, 544 S.W.2d 661.

[44]*See, Phillipson v. Bd of Admin.*, 3 Cal.3d 32, 40, fn. 6, 89 Cal. Rptr. 61, 66, 473 P.2d 765 (1970), referring to former § 161b of the Cal. Civ. Code, now § 21210 of the Cal. Government Code.

[45]*Burnet v. Harmel*, 287 U.S. 103, 110 (1932). *See also, United States v. Mitchell*, 403 U.S. 190, 197 (1970).

[46]*Charleston Assn. v. Alderson*, 324 U.S. 182, 185-86 (1944) and cases there cited.

In his supplemental brief to the Court of Appeal of July 3, 1979, the Husband argued that 37 U.S.C. § 701(a), as modified and supplemented by 42 U.S.C. §§ 659(a) and 662(c) bars the applica-

E. Community property states are not free, as they believe, to decide this controversy involving conflicts with federal law within the limited horizons of local law. Here, incompatible doctrines of local law must give way to provisions of federal law grounded in War Powers considerations.

Federal law governs concerns affecting nationwide federal programs.[47] Here, federal interests are sufficiently implicated to warrant the protection of federal law.[48] Even apart from considerations of uniformity, the application of state community property laws to Army retired pay frustrates specific objectives of federal programs. This Court must accordingly "fashion special rules solicitous of these federal interests."[49]

VI. Conclusion

For reasons set forth herein and in the Husband's brief on the merits, the Court should deny the Wife's claim to a 43% interest in the Husband's Army retired pay.

Allowing an ex-spouse to claim and successfully take a portion of the former member's Army retired pay is totally inconsistent with and significantly impairs the Congressional plan. Federal law prevents such a result.

Respectfully submitted,

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
Counsel for Appellant

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tion as to Husband's retired pay of § 4803. The lower court was fully apprised that the state statute, as applied, was being assailed as invalid on federal grounds.

[47] *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1978).

[48] *See, Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979).

[49] *United States v. Kimbell Foods, supra*, 440 U.S. at 728.

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No. 80-5

IN THE SUPREME COURT

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OCTOBER TERM, 1980

RICHARD JOHN McCARTY, Appellant,

vs.

PATRICIA ANN McCARTY, Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIRST APPELLATE DISTRICT

OPPOSITION TO MOTION FOR LEAVE TO FILE

AMICI CURIAE BRIEF IN SUPPORT OF APPELLEE

MATTANIAH EYTAN
KAPLAN, RUSSIN, VECCHI, EYTAN
& COLLINS
332 Pine Street, Fourth Floor
San Francisco CA 94104
Telephone: (415) 421-1100

Counsel for Appellant

January 8, 1981

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ON APPEAL FROM THE COURT OF APPEAL
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FIRST APPELLATE DISTRICT

OPPOSITION TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLEE

Appellant Richard John McCarty opposes the motion for leave to file an amici curiae brief in behalf of the National Organization for Women Legal Defense and Education Fund, National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives, California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County.

Appellant has consented to the filing of an amicus brief prepared by attorneys with the firm of Covington and Burling, Washington, D.C., in behalf of certain organizations representing military wives. Appellant has not consented to the filing of an additional amicus brief in behalf of organizations whose only connection with the subject matter of this litigation appears to be the biological coincidence that both the Appellee and the members of the amici organizations are female.

The respondent organizations appear with one exception to be womens' organizations involved in the law.*/ These organizations identify with the entire range of womens' problems and identify with the Appellee simply because she is female.

Respondents' amicus brief in large measure argues social policy concerns as if this were a sex discrimination case -- which it is not. The respondent organizations present arguments which are better suited for legislative rather than judicial concern. In any event, their motion for leave to file does not "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case" -- all as required by Rule 36.3.

The submission of an amicus brief over the objection of a party litigant is not favored. Here, consent has been given to the filing of an amicus brief by those organizations whose members may be directly affected by the outcome of the decision in this dispute. There is in these circumstances no justifiable reason for further complicating the proceedings by allowing the filing of the amicus brief tendered by respondents.

The motion should be denied.

Dated: January 8, 1981

Respectfully submitted,

By: _____
Maxtaniah Eytan
KAPLAN, RUSSIN, VECCHI, EYTAN & COLLINS

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*/ The exception is Action for Former Military Wives, an organization that presumably represents spouses who might be directly affected by the decision in this case. But that organization already appears as an amicus in the brief filed with Appellant's consent by the attorneys from Covington & Burling. It is not proper to have the views of an amicus presented in two separate amicus briefs.

CERTIFICATE OF MAILING

The undersigned, at San Francisco, California, certifies to be true under penalty of perjury, that he is a citizen of the United States over 18 years of age and is not a party to the within action; that his business address is Fourth Floor, 332 Pine Street, San Francisco, California 94104; that he executed this certificate and served a true copy of the foregoing document by mail by placing same in an envelope, sealing, fully prepaying postage thereon and depositing said envelope in U.S. Mail at San Francisco, California on the 8th day of January, 1981; and that said envelopes were addressed as follows:

Gertrude D. Chern, Esq.
CHERN, BRENNEMAN & GARCIA
P. O. Box 667
Santa Maria CA 93456

Walter T. Winter, Esq.
100 Bush Street, 20th Floor
San Francisco CA 94104

Mattaniah Eytan

Subscribed and sworn to
before me this 8th day of
January, 1981.

OFFICIAL SEAL
CHARLES W BOWMAN
NOTARY PUBLIC - CALIFORNIA
SAN FRANCISCO COUNTY
My comm. expires JUN 29, 1984

Charles W Bowman
Notary Public

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On Appeal from the
Court of Appeal of California
First Appellate District

BRIEF AMICI CURIAE ON BEHALF OF CERTAIN MEMBERS OF CONGRESS AND ORGANIZATIONS (In Support of Appellee)

WILLIAM H. ALLEN
(Counsel of Record)
JEFFREY S. GERSHMAN
JOSEPH A. GODLES
STEPHEN J. NARKIN
Covington & Burling
888 Sixteenth
Street, N.W.
Washington, D.C. 20006
(202) 452-6192

Attorneys for Amici Curiae

January 1981

The amici on whose behalf this brief is filed are: Representatives John L. Burton, Millicent Fenwick, Margaret M. Heckler, Barbara A. Mikulski, Patricia Schroeder, John F. Seiberling, Olympia Snowe and Howard Wolpe; Action for Former Military Wives, Ex-Military Wives Alliance of Unrecognized Women Veterans, National Military Wives Association, Ex-Partners of Servicemen for Equality, and Association of American Foreign Service Women.

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BRIEF AMICI CURIAE ON BEHALF OF CERTAIN MEMBERS OF CONGRESS AND ORGANIZATIONS

STATEMENT OF INTEREST OF AMICI CURIAE

This brief amici curiae is filed with the written consent of counsel for the parties by eight members of Congress[1] and five organizations

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[1] The eight members of Congress are the Honorable John L. Burton, Millicent Fenwick, Margaret M. Heckler, Barbara A. Mikulski, Patricia Schroeder, John F. Seiberling, Olympia Snowe and Howard Wolpe.

composed of spouses and former spouses of military and foreign service personnel.[2]

The eight members of Congress believe that the decision in this case will significantly affect the extent to which state and local governments will remain free to exercise the authority that has traditionally been theirs with respect to family law issues. It will also have important consequences for large numbers of the constituents whom they represent.

The five organizations are made up of people who could be directly affected in a very adverse way should it become established that military pensions are not subject to division by

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[2] The five organizations are Action for Former Military Wives, Ex-Military Wives Alliance of Unrecognized Women Veterans, National Military Wives Association, Ex-Partners of Servicemen for Equality, and Association of American Foreign Service Women.

the states upon dissolution of a marriage under principles of community property law or equity.

STATEMENT OF FACTS

The relevant facts can be quickly summarized. The appellee, Patricia Ann McCarty, was married to the appellant, Richard John McCarty on March 23, 1957. In the second year of their marriage, Mr. McCarty went on active duty with the Army as a physician. Appellant continued to serve with the Army through December 1, 1976, when he petitioned for divorce in the appropriate California Superior Court. At that time he had served 220 months of the 240 months required for eligibility for Army retired pay.

Appellant's petition for divorce was subsequently granted. The Superior Court ordered appellant to

pay alimony for support, divided the available cash and the value of two vehicles between the spouses, and determined that appellant's retirement pay should be divided as quasi-community property pursuant to Section 4803 of the California Civil Code. After that decision was reached, appellant retired from the Army and began receiving retired pay in the amount of $1,500 a month.

Appellant appealed the portion of the Superior Court's decision that required the division of his Army retired pay. The Court of Appeal affirmed the lower court's decision, distinquishing this Court's intervening decision in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), and the California Supreme Court declined to grant a hearing.

SUMMARY OF ARGUMENT

I.

This case touches on two areas traditionally reserved for the states -- family law and property law. There must be a clear statement from Congress before an intent to preempt state law in those domains will be found. In past cases before this Court, such strong language was present. The language of the statute here, supported by other indications of its meaning, compels a contrary result. The relevant provision, 37 U.S.C. § 701(a), does not on its face forbid anything but instead authorizes Army and Air Force officers to assign or transfer current pay. Even if a negative inference is supplied, the clause only reaches to voluntary assignment of future pay. And in other federal pay statutes, Congress has used language that undoubtedly does cover involuntary

assignments, which is what is involved here.

Military pensions may in part be compensation for current services. But no superior federal policy prevents California from treating them totally as pensions for state law purposes. Appellant's contentions that a ruling for Mrs. McCarty would entitle her to pension benefits beyond her husband's death or in the future give spouses of servicemen a right to enjoin retirement from the military are simply not so.

II.

Because of the traditional roles of women in our society as child-rearers and homemakers, women are often unable to remain in the work force long enough to earn their own retirement benefits. As a consequence, many elderly women without husbands live on poverty

level incomes. This plight is even more egregious for former wives of servicemen, whose chances of earning a pension while married are frustrated by their constant relocation, the customary duties of a military wife, and the long absences from home of their husbands. The Government has a strong interest in providing financially for the elderly, and in the case of a military wife whose marriage is dissolved, that policy calls for allowing the states to divide military pensions upon divorce.

ARGUMENT

I. NOTHING IN THE FEDERAL STATUTES PROVIDING FOR MILITARY RETIREMENT PAY CALLS FOR OVERRIDING STATE RULES GOVERNING THE DIVISION OF PROPERTY ON DIVORCE

A. No Subjects of Legal Rules Are More Traditionally Reserved for the Exercise of State and Not Federal Sovereignty Than Property and Domestic Relations

The legal rules governing people's most intimate relationships with

one another -- domestic relations law -- and people's relationships to land, things and money -- property law -- are unquestionably matters primarily of state and not of federal concern. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890). "[T]he power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States . . . to the legislature of [each] State." Labine v. Vincent, 401 U.S. 532, 538 (1971). No less is property law the primary concern of the states and not the national government. Family property law, in particular, is of a "peculiarly local jurisdiction" of the states and implicates "intensely

local interests." United States v. Yazell, 382 U.S. 341, 349, 353 (1966). This is in keeping with the states' "long-established role . . . in creating property interests," Aquilino v. United States, 363 U.S. 509, 513 n.3 (1960), as well as with their responsibility for the laws governing family life. For so dominant is the state role in property law that, after title to property has passed from the United States to a private party, "that property, like all other property in the State, is subject to State legislation." Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839).

What has just been said is not debatable. Appellant does not attempt to controvert it. The primacy of the states is asserted -- not denied -- in those few cases in which this Court has found that Congress has

ordained that federal law shall supersede some aspect of state property or domestic relations law. In Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the one opinion in over 440 volumes of the United States Reports that gives even plausibility to appellant's contention that state law has been displaced here, the Court was emphatic on the point:

> "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. Wetmore v. Markoe, 196 U.S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352 (1966)." Id. at 581.

We now describe the compelling reasons that the Court found for the

limited incursions into state areas of responsibility that Hisquierdo and the handful of remotely similar cases allowed. Then we demonstrate that no such reasons are present in this case.

B. When Congress Means To Intrude on State "Family and Family-Property Law" To Preserve Federal Interests, It Says So Unmistakably

The Hisquierdo case concerned the division, upon divorce, of retirement benefits that the husband in the divorce action expected to receive under the Railroad Retirement Act. The Court held that under that statute the wife could not be awarded a share of her husband's benefits as community property. The reason was -- principally -- the unequivocal language of Section 14 of the Railroad Retirement Act of 1974, which carried forward what was said in Section 12 of the Act of 1937.

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." 45 U.S.C. § 231m.

The legislative history confirmed that the purpose of the clause was "to make it sure that the annuitant gets the pension." 439 U.S. at 576 n.7. The Court also noted that Congress had provided in the Act benefits for the spouse of a railroad worker, which "even embodied a community concept to an extent," but that these benefits ceased upon divorce, demonstrating that Congress meant that community to terminate at that point. Id. at 584-85. Section 14, its history and the other manifestations of Congressional purpose disposed of the wife's principal claim, which was to periodic payments

of a part of what the husband would receive under the Railroad Retirement Act.

The Court also rejected an alternative claim. This was for an offsetting award of community property that was available at the time of the divorce, as compensation for the wife's interest in her husband's pension. Again, Section 14 foreclosed that claim. The Court held that the compensatory offset scheme conflicted with the clause of Section 14 that states flatly that the payment of an annuity shall not "be anticipated." 439 U.S. at 588-90.

The Court in Hisquierdo adverted to "four prior occasions" on which it had "found it necessary to forestall . . . [major damage] to federal rights by state law based on community property concepts." Id. at

582. On each such occasion Congress or its delegate had spoken in terms that admitted of as little doubt as the terms of Section 14 of the Railroad Retirement Act.

In McCune v. Essig, 199 U.S. 382 (1905), the Court rejected an attempt by Mary McCune to establish an undivided one-half interest in a parcel of land. Her parents had settled the land as homesteaders. Under the Federal Homestead Act, a patent to land would not issue until certain conditions were met. McCune's father died, and his widow exercised her right under the Act to fulfill the requirements for a patent. Appellant claimed that a half interest had passed to her at her father's death, under the community property laws of Washington. The Homestead Act, however, clearly gave the widow a right to

continue cultivation and ultimately to obtain a fee title by patent. The Court was left in no doubt. "It requires an exercise of ingenuity to establish uncertainty in [the Homestead Act] provisions." Id. at 389.

In Wissner v. Wissner, 338 U.S. 655 (1950), appellant's estranged husband had bought a National Service Life Insurance policy and named his parents as beneficiaries. Appellant asserted her right to one-half of the insurance proceeds under California community property law. This Court held that California law had been preempted by clear Congressional enactments. The controlling section provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] . . . and shall . . . at all times have the

right to change the beneficiary or beneficiaries." Id. at 658 (citations omitted). Moreover, the diversion of future payments to Wissner's widow would have necessitated seizure by legal process. This would have been in "flat conflict" with the provision of the federal insurance statute that "[p]ayments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" Id. at 659.

In Free v. Bland, 369 U.S. 663 (1962), petitioner Free claimed sole title to a United States savings bond registered to "Mr. or Mrs. Free." His wife had recently died, and her son from a previous marriage asserted an interest in the bonds by virtue of

Texas community property laws. A Treasury regulation, issued pursuant to undoubted Congressional authority and designed to carry out the Congressional purpose of making savings bonds attractive to potential buyers, id. at 669, made the survivor of two co-owners of an "or" form bond "'the sole and absolute owner.'" Id. at 667 n.5. Another provision of the regulation stated that "'[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by [the] regulations.'" Id. at 667 (citations omitted). The Court recognized that "[t]he clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner." Id. at 668. See also Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (Treasury regulations making the beneficiary of bonds payable

on death the sole and absolute owner preempt state community property law).

C. In Statutory Provisions Dealing with Army Officers' Retirement Pay, Congress Expressed no Intent To Override State Law Governing the Disposition of Property upon Dissolution of a Marriage

The statutory provisions dealing with Army officers' retirement pay stand in stark contrast to the statutes and regulations discussed above.

Appellant discourses learnedly and at length on the statutes that govern Army retirement pay. When all is said and done, however, there is only one section of the United States Code that is even arguably pertinent to his preemption claim. That is 37 U.S.C. § 701(a). It is pertinent, if at all, only by implication. In terms it is an authorization to Army and Air

Force officers to assign their pay checks (including retirement paychecks) as they come to hand.

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable."[3]

The implication may be that the officer may not "transfer or assign his pay account" in advance. Such an implied restriction falls markedly short of the catalogue of means of ensuring that the annuitant gets his pension that were held in Hisquierdo to preclude the application of state community property law. If an officer may not assign future pay, it does not follow that, as Section 14 of the Railroad

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[3] Section 1-17 of Army Regulation No. 37-104-1 implements this section for retired pay. It provides that "[a] retired officer may transfer or assign retired pay when due and payable."

Retirement Act has it, no other federal law and no state law may result in tax or garnishment or attachment "or other legal process under any circumstances whatsoever" and that the payment of an annuity shall not "be anticipated."

The negative implication of Section 701(a), at that, is a dubious one. If Section 701(a) implicitly forbids Army and Air Force officers to "assign" their future pay, Section 701(d) turns right around and allows them to make "allotments" from their future pay "for the support of . . . relatives, or for any other purpose that the Secretary . . . [of the Army or Air Force] consider proper." Allotments, then, are permitted by statute for wives, children and other relatives and, by regulation, for purposes such as buying savings bonds and paying insurance premiums. 32

C.F.R. §§ 59.1-59.4. "Allotment" is not defined in the Code, but even if it is thought to embody the idea of revocability, as "assignment" presumably does not, it is certainly a kind of "transfer." Section 701(a) authorizes transfers as well as assignments of pay when due and payable, and appellant, in terming the statute an anti-assignment statute (Appellant's Br. 17), must logically be urging that the statute is an anti-transfer statute also, implicitly forbidding transfers of future pay.

Appellant, having assumed without analysis the negative implication of the authorizing language of Section 701(a), goes so far as to say that the phrase "'[w]hen due and payable' is simply an alternative phrasing for the prohibition against 'anticipation' considered in Hisquierdo." (Appellant's

Br. 27.) Not so. The Court in Hisquierdo looked to the law of trusts for enlightenment on what a prohibition against anticipation entails and found that, according to Dean Griswold's classic treatise on spendthrift trusts, such a prohibition is commonly understood to mean that "the interest of a sole beneficiary shall not be paid to him before a certain date," Griswold, Spendthrift Trusts § 512, p. 583 (2d ed. 1947), quoted at 439 U.S. at 588. Thus, in the Hisquierdo case, the offsetting immediate award that the wife sought as an alternative to periodic payments would have improperly anticipated payment by allowing her "to receive her interest before the date Congress has set for any interest to accrue." Id. at 589. If Army and Air Force officers are forbidden, analogously to Dean Griswold's sole

beneficiary of a trust, to receive advances against their pay -- to "anticipate" their pay -- it is not by virtue of Section 701(a) (or any other statute appellant has cited).

It is, however, instructive here also to look to the law of trusts for enlightenment on the character of the restriction that Section 701(a), read most generously for appellant, implies. There are two categories of state trust statutes dealing with the assignability of the beneficiary's interest in a trust. The statutes have been collected by Professor Scott in his treatise. 2 Scott, Trusts § 152.1 (3d ed. 1967 & Supp. 1979).

One group of statutes limits the voluntary assignment of a beneficiary's interest and is worded as a restriction on the beneficiary. The other group restricts involuntary

assignments and is phrased in terms of the extent to which the interest in the trust can be reached by creditors and courts. Section 701(a), if relevant at all, is within the first group. It prohibits, if anything, only voluntary assignments by the officer. Involuntary assignments by way of legal process are left untouched. And it was to the prohibition of involuntary assignments by way of legal process that the Court was referring when it said that Section 14 of the Railroad Retirement Act "plays a most important role in the statutory scheme." 439 U.S. at 583-84. Its role is that of an "anti-attachment provision[s]," ensuring "that the benefits actually reach the beneficiary." Id. at 584. Statutory provisions that merely forbid voluntary assignments necessarily play a lesser role.

That Section 701(a) reaches only voluntary assignments of future pay, if any, means that it contrasts not only with Section 14 of the Railroad Retirement Act but also with other federal pension plan provisions. Involuntary assignments are precluded in no uncertain terms in these statutes as well. The law governing federal civil service pensions generally forbids assignment, in law or equity, and immunizes the pension from "execution, levy, attachment, or other legal process." 5 U.S.C. § 8346. The statutes governing Foreign Service pensions and veterans' benefits contain comparable language. See 22 U.S.C. § 1104 (Foreign Service); 38 U.S.C. § 3101 (veterans' benefits). Even more strikingly, as appellant himself points out, Congress has adopted "a strong anti-assignment provision for

the Survivor Benefit Plan, 10 U.S.C. § 1440." (Appellant's Br. 30.) The survivor benefit plan is an annuity plan for the survivors of servicemen financed out of deductions from retirement pay. (See Appellant's Br. 21.) The anti-attachment provision (a more apt characterization than appellant's) of the governing statute reads, "No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process."

As long ago as 1792 the Congress knew how to write a strong anti-assignment, or anti-attachment, clause. The very same day that the original version of Section 701 was passed, applicable only to enlisted men, Act of May 8, 1792, ch. 37, § 4, 1 Stat. 279, the Second Congress made the arms and ammunition that a militiaman was required to

keep "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes." Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271-72.

Appellant ascribes significance to the fact that the Foreign Service and Civil Service pension systems have lately been amended to make pensions subject to division as part of a divorce decree. Foreign Service Act of 1980, Pub. L. No. 96-465, § 820(b)(1), 94 Stat. 2120 (to be codified as 22 U.S.C. § 4060); 5 U.S.C. § 8345(j)(1). (Appellant's Br. 24-25.) A similar amendment to the military retired pay provisions was considered but not enacted in the 96th Congress. H.R. 2817, 96th Cong., 1st Sess. (1979); H.R. 3677, 96th Cong., 1st Sess. (1979); H.R. 6270, 96th Cong., 2d Sess. (1980). Amendment of the Foreign Service and Civil Service

pension laws was necessary because of the anti-attachment provisions of those statutes. A mere clarification of the military pension scheme, which included no anti-attachment provision, was by no means so urgent.[4] In any

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[4] Appellant quotes a statement by one of these amici, Representative Schroeder, the sponsor of H.R. 2817, as evidence that existing law does not entitle an ex-spouse to a share of a serviceman's pension. (Appellant's Br. 25, n.35.) (The full statement is attached as an Appendix.) The bill would have entitled a former spouse to a pro rata share of a serviceman's pension, provided that the couple was married at least two years. It was in this context that Rep. Schroeder said that "[u]nder current law a divorced spouse is prohibited from receipt of retirement . . . benefits," Appendix at 1, to indicate that existing law does not give the former spouse any pro rata share. Rep. Schroeder stated later on that the reason legislation was needed was to "clear up the confusion in the courts about Congressional intent regarding pensions." Appendix at 8. These statements are not probative of the meaning of § 701(a). "The interpretation placed upon an existing statute by a subsequent group of Congressmen

(Footnote Continued)

event, the subsequent inconclusive Congressional consideration is not a ground for ascribing one meaning or another to the existing statute. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960).

The short of it is that the crystal-clear language of the statutes involved in Hisquierdo and the precedent cases, which this Court has rightly required as a prerequisite to a decision

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(footnote cont'd)

who are promoting legislation and who are unsuccessful has no persuasive significance [in the courts]." United States v. Wise, 370 U.S. 405, 411 (1962). These amici claim no special authority for the construction of federal statutes urged in this brief merely by virtue of the fact that Representative Schroeder and other members of Congress are among the amici.

that Congress meant to intervene in traditionally local affairs, is lacking from the military pay statutes. Even the much stronger clause in the Employee Retirement Income Security Act of 1974, which requires private pension plans to proscribe the assignment or alienation of benefits, 29 U.S.C. § 1056(a)(1), has been held insufficient to preempt state community property law. In re Marriage of Campa, 89 Cal. App.3d 113, 152 Cal. Rptr. 362 (1979). This Court only last term dismissed an appeal in that case for want of a substantial federal question. 444 U.S. 1028 (1980). Moreover, the intent to cut off the marital community, which this Court inferred in Hisquierdo from the termination of a spouse's annuity upon divorce, 439 U.S. at 584-85, is absent here. And the anti-anticipation clause, which prevented an award of

offsetting community property in Hisquierdo, is absent as well.

D. No Discernible Congressional Policy Is Frustrated by Treating an Army Pension or Pension Expectancy as Community Property

The policy that underlies Section 701(a) is a familiar one. Section 701(a) is no more than the codification of a very old principle: the law will not permit an assignment of a public officer's salary. See generally 6 Am. Jur. 2d Assignments § 52 (1963); 6A C.J.S. Assignments § 26 (1975); 70 C.J.S. Pensions § 9 (1951); 1 Scott, Trusts § 79 (3d ed. 1967). That rule is meant primarily to protect the public. An employee who has already frittered away his future salary may not put forth his best efforts on the job. There may also be a desire to protect the public

servant against his own folly. See 4 Corbin, Contracts § 857 (1951).

In the case of Army and Air Force officers, the anti-assignment policy, if it exists, cannot be a very strong one. There is no statute prohibiting their fellow officers in the Navy and Marine Corps from assigning their pay. There was no such prohibition implied by statute even for Army officers until 1907. The original anti-assignment statute applied only to privates and non-commissioned officers. Now Section 701(c), that provision dates back to 1792. Act of May 8, 1792, ch. 37, § 4, 1 Stat. 279, 280. There is no illuminating legislative history.[5] A statute governing the assignment of pay by

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[5] As originally presented to the House in February 1792, the bill to which the anti-assignment provision was added made no mention of assignments of pay. 1 American State Papers 46 (Misc. 1834).

commissioned officers was first enacted in 1907. Act of March 2, 1907, ch. 2511, 34 Stat. 1158, 1159. Previously commissioned officers were covered only by Army regulations. See Act of April 23, 1904, ch. 1485, 33 Stat. 259, 266. There is surely no basis here for inferring the sweeping preemptive effect for which appellant contends.

This is aside from the fact that we deal here with retired pay, with respect to which the need to protect the public against the improvidence of its servant is minimal.

It has been argued that a decision in favor of appellee would unjustly reduce retirement benefits of the bachelor sailor who has too much to drink one evening and wakes up the next morning only to find that he got married the night before. While such stories may be the grist of Hollywood

script writers, we suspect that the incidence of such events in real life is so slight that the argument can fairly be disregarded.

It has also been argued that recruiting of military personnel would be hindered by a decision upholding California pension splitting. A report by The President's Commission on Military Compensation, however, disagrees:

> "The retirement plan apparently has little influence on prospective recruits or on service members in their first enlistment. This phenomenon results from the strong preference among young people for current income rather than deferred income. For such persons, up front compensation in the form of pay or bonuses can be a much more effective incentive than retirement . . . ." Report of the President's Commission on Military Compensation, p. 27, April 1979.

E. The Fact That for Some Purposes Military Retirement Pay Is Regarded as Pay and not a Pension Does Not Prevent Its Being Treated as Community Property

Appellant argues that, because Army retired pay "is continuation of active duty pay -- in the nature of reduced pay for reduced services" (Appellant's Br. 38), it cannot be treated by a state as what appellant terms "divisible property."

The conclusion does not follow from the premise. There is no question of the continuing obligations of the retired Army officer that appellant describes. Nor can one doubt the authority he cites for the proposition that retired pay is, for some purposes, different from a pension. Yet, it is hard to imagine that Colonel McCarty, just like the California courts (Appellant's Br. 37 n. 59), has

not in unguarded moments referred to his Army pension. Of course, the compensation he is now receiving is in the nature of a pension -- as well as in the nature of reduced pay for reduced services. For most retired officers, the services are reduced to nothing. California was entitled to look to the realities and not to form. The realities are that the expectancy of retired pay came into being during the existence of the marital community. The officer was married when he performed the services that entitled him to retire with continued compensation. Thus, it is appropriate to treat the expectancy, as the California courts have, as an asset of the marital community. No federal statute defining the nature of retired pay forbids such treatment. As we have seen, Congress last year acted to allow the division

of Foreign Service retirement pay (p. 27, supra); like military officers, retired Foreign Service officers are -- by the same amendatory statute -- liable to recall for active service. Foreign Service Act of 1980, supra, § 308, 94 Stat. 2086 (to be codified as 22 U.S.C. § 3948).

In none of the other respects suggested by appellant does the California treatment of retired pay impinge upon any defined federal interests.

Appellant suggests that the "implication" of the California decision to apply community property principles to military retired pay is that the divorced wife -- assuming that the member of the service is the husband -- has an "entitlement" to retired pay for as long as she lives, irrespective of whether her spouse predeceases her. (Appellant's Br. 32.) There is

of course no substance to this suggestion. No person can claim any greater "entitlement" to retired pay than federal law itself permits. Under federal law, the duration of military pay is limited to the lifetime of the person who earned it; when that person dies, the benefit ceases to exist. That fact of life has already been recognized by the California courts themselves. See, e.g., Fithian v. Fithian, 10 Cal.3d 592, 599, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), cert. denied, 419 U.S. 825 (1974).

Appellant's conjecture that a serviceman's ex-spouse might attempt to control the serviceman's decision whether to remain in the military is similarly misguided. Appellant's Br. 32-33. The California Supreme Court has already specifically stated that it does not believe that its community

property treatment of retired pay in any way limits "the employee's freedom to change or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits) or to elect between alternative retirement programs." In re Marriage of Brown, 15 Cal.3d 838, 849, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Under California law, "[t]he employee retains the right to decide, and by his decision to define, the nature of the retirement benefits owned by the community." 15 Cal.3d at 850. In short, there is simply no basis for appellant's suggestion that the California courts might attempt to "intervene . . . in the operation of the personnel system of the Army" by attempting, on behalf of an ex-spouse, to control the decision of the former spouse with respect to continued military tenure. Appellant's Br. 33.

II. THE NATIONAL POLICY THAT FAVORS PROVISION FOR THE FINANCIAL NEEDS OF THE ELDERLY WOULD BE SUBVERTED BY A DECISION THAT CALIFORNIA LAW HAS BEEN PREEMPTED

There is an undoubted national policy that favors caring for the financial needs of people in their later years. The expressions of the policy are too many and too familiar to bear citation. The provision of military retired pay is itself one such expression and -- for the military wife whose marriage lasts until the the husband dies -- the military survivor benefit plan to which we have referred is another. But, unless the states are left free, as a decision against preemption in this case would leave them free, to divide military retired pay on dissolution of a marriage, the national policy will not be well served in the case of the military

spouse whose marriage fails. The case in which the Court is asked to decide against preemption comes from a community property state, but the impact of a decision against preemption would not be limited to the community property states. States other than the community property states make equitable distributions of marital property upon divorce, distributions that are comparable to treatment of the property as that of the marital community. See, e.g., Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978), cert. denied, 442 U.S. 940 (1979); Kruger v. Kruger, 139 N.J. Super. 413, 354 A. 2d 340 (1976); In re Marriage of Musser, 70 Ill. App.3d 706, 388 N.E. 2d 1289 (1979). Those states would be as free as California to give effect to national policy in their divorce decrees.

To provide financially for military spouses whose marriages fail is particularly urgent because (1) most of them are women, who as a group are less likely to enjoy appreciable pension payments than men, and (2) the military life imposes extraordinary limits upon the ability of the military wife to earn a pension of her own.

In 1978 only 29 percent of women aged 55 or older, and only 9 percent of women aged 65 or older, who maintained families without a husband were employed. The median income for these women between the ages of 55 and 64 was $4,533. For women from the group who were 65 and older, it was $3,087.[6] In 1976, 72 percent of

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[6] Department of Commerce, Bureau of the Census, Social and Economic Characteristics of the Older Population: 1978, p. 20.

unmarried elderly women had incomes below the poverty line.[7]

With most elderly women unemployed and living on near-poverty-level incomes, the need for a pension during old age is acute. Yet the barriers to earning entitlement to a pension in private employment are such that even most women in the work force reach retirement age without pension rights of their own.

Employed women are less likely than men to be covered by private pension plans, because -- for the most part -- they work in poorer industries where fringe benefits such as pensions do not exist. In addition, women are less likely than men to be union members and therefore less

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[7] President's Commission on Pension Policy, An Interim Report, p. 28, May 1980.

likely to benefit from pensions provided under collective bargaining agreements. Since women are paid about 59 percent of what men earn, even for the woman who does earn a pension, the pension benefits are likely to be smaller.[*]

The right to earn a pension is often foreclosed to women because they interrupt their work to bear and rear children. Although women between the ages of 20 and 24 have the highest labor force participation rate (68.3 percent in 1978), by age 25 many women drop out for child rearing. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1000 et seq., which governs private pensions,

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[*] Benson, Women and Private Pension Plans, presented to the U.S. Dept. of Labor Advisory Council on Employee Welfare and Pension Benefit Plans, p. 3, November 1980.

permits an employer to require an employee to work 10 years before becoming entitled to a pension.[9] This is a distinct hardship for women, who are likely to hold their jobs for shorter periods than men.[10] For example, a woman who works from age 18 until age 25 and then drops out to have a child may not be entitled to a pension at all because she has not worked 10 years. Furthermore, ERISA permits private pension plans to require an employee to work at least 1,000 hours in a year before

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[9] 29 U.S.C. § 1053.

[10] Department of Labor, Bureau of Labor Statistics, News Release USDL 79-285, April 23, 1979; Congressional Research Service of the Library of Congress for the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, Women and Retirement Income Program: Current Issues of Equity and Adequacy, Committee Pub. No. 96-190, 96th Cong., 1st Sess. (1979).

entering a plan.[11] Women are far more likely than men to work fewer than 1,000 hours.[12]

The obstacles to earning a pension in the private sector are particularly high for wives of servicemen. The life of a military wife is different from that of her civilian counterpart. Military people have to move frequently, sometimes overseas or to parts of this country where jobs for women are not easy to find. Appearing before the Citizens Conference on Pension Policy on September 5, 1980, a representative of an organization of former military wives testified that 15 moves in a 30-year career was not unusual.[13] Among 211

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[11] See 29 U.S.C. § 1052.

[12] Benson, supra, p. 44.

[13] Testimony of Winnifred Cowan on behalf of Ex-Partners of Servicemen for Equality to the Citizens Conference on Pension Policy, September 5, 1980.

members of the organization surveyed, the average length of the wife's marriage was 22 1/2 years. During the marriage, an average of 12 moves were made.[14]

Frequent moves prevent a military wife from accumulating an employment tenure that would entitle her to earn her own retirement benefit. And private employers are wary of hiring a military wife because her husband will inevitably be reassigned to another duty station. Even when military wives are able to obtain a job, they earn less than their civilian counterparts. Department of Defense, Report of the Pay Adequacy Study, October, 1979.

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[14] Testimony of Winnifred Cowan on behalf of Ex-Partners of Servicemen for Equality before the House Armed Services Subcommittee on Military Compensation, May 28, 1980.

Traditions and customs within the military community have also discouraged military wives from working. Officers' wives, such as appellee, are less likely to work (16.2 percent) than enlisted men's wives (31.6 percent). This is of course partly because officers are paid more, "but also because the role of the officer's wife is subject to more specific normative regulation. Officers' wives are generally dissuaded from outside employment, but no such norm affects the wife of an enlisted man." Little, Occupational Socialization 253.

Testimony by the former wife of a general before the House Armed Services Subcommittee on Military Compensation on May 28, 1980, illustrates the point. She testified that she was always expected to nurture her husband's

career from the sidelines by attending wives' club functions, entertaining, doing volunteer work, and attending command functions.[15] In addition to these responsibilities, long absences of the military man from his home and family require the presence of the wife in the home, further preventing her from engaging in outside employment. "The average Navy career involves at least 7 out of 20 years spent away from home, in extreme cases, many more. The Navy spouse, left with children to care for and with a household to manage, must act for months at a time as independently as a single parent." Dingle Associates, Inc., The Navy Leaders' Family Manual prepared for Department of the Navy, p. 3, 1980.

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[15] Id.

Wives of commanding officers have special duties. A publication entitled Guidelines for the Wives of Commanding and Executive Officers, compiled by the Protocol Committee of the Navy Wife Line Association (1977), states that

> "this is her time to make a visible and necessary contribution both to the Navy and to the country. She has a very important part to play in (her husband's) success as a commanding officer. During her husband's command, she is a person set apart. She has heightened responsibility to her husband and his career." (p. 1)

An independent career for a commanding officer's wife is not encouraged because she is expected to have a great deal to do at home. In fact the Guidelines urge the commanding officer's wife to

> "put in extension phones with extra long cords (or remote phone jacks) in all major work areas, i.e., laundry room, kitchen, den, and bedroom. Always take calls in an area where there is work to be

> done. It can be amazing how much laundry can be done, how much baking, dinner preparation, or just plain cleaning can be done on the end of a 13-foot cord. The cost of the long cords and extensions will more than pay for themselves if they enable keeping up with domestic duties -- even if a significant time is spent on the phone." (p. 11).

The nature of the military compensation system aggravates the hardship for the former military spouse who is not awarded a portion of her former husband's retirement benefit. Traditionally, military compensation differs from civilian compensation in that current pay is relatively low, but pension benefits are relatively large. For example, the lifetime value of the typical United States military retirement pension for an officer with 20 years of service who retires at age 43 is $420,000. For an officer with 30 years of service who retires at age 53, the pension is

worth $590,000. Report of the President's Commission on Military Compensation, p. 31, April, 1978.

Because of the low current pay and expectation of a generous retirement benefit, most servicemen do not accumulate assets other than the retirement benefit. This lack of savings and investment is encouraged because the government provides housing to over one-third of all eligible personnel. Little, Occupational Socialization 258. The frequent changes in duty assignments and relocation of residence force most servicemen to rent rather than buy their homes. Conseqently, equity build-up that civilian homeowners enjoy exists far less among military couples.

The nomadic lifestyle of the military family and the lack of current asset accumulation breed a strong

dependence on military benefits for the serviceman's wife and family. The Library of Congress reported to the House of Representatives Select Committee on Aging that, upon divorce, spouses

> "do not retain any entitlement to nonmonetary benefits due to spouses of military retirees, such as medical care, exchange and commissary privileges, and use of certain military base privileges. It has been argued by many observers that the abrupt cut-off of compensation and benefits to the divorced spouse of a military retiree is grossly inequitable. These persons cite the sacrifices made by military wives during the course of the military career with attendant moves (which interfere with the wife's ability to establish her own career), long intervals of managing a household during a husband's absence, and arduous, irregular, and long working hours and conditions."[16]

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[16] Congressional Research Service of the Library of Congress for the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, Comm. Pub. No. 96-190, 96th Cong., 1st Sess. (1979).

Another study of Navy wives by Dr. Sabra Wolley-Downs of the Family Services Section of the Bureau of Navy Personnel found that, within a group of older women surveyed, most wanted their husbands to finish 20 years in the Navy, since at that point the servicemen would become entitled to retirement benefits.

The plight of the ex-military wife has recently come under scrutiny by the Government's policymakers. Their unanimous conclusion is that retirement benefits should be apportioned between both spouses upon the dissolution of the marriage.

In August of 1980 the President's Commission on Pension Policy noted that "there has been explicit recognition of the earnings sharing approach to earned pension benefits in recent divorce settlements, particularly

in community property states." Working Papers: Working Women and Retirement, p. 41, August 1980. In the Commission's Interim Report in May of 1980 the Commission stated that it

> "believes that employee pensions should be taken into account when people divorce, and survivor protection should be automatic for married and divorced spouses. For divorced spouses, the survivor protection should be prorated based on years of pension service accrued during the marriage." (p. 32).

The Commission's draft of its final Staff Recommendations on the subject of pension and divorce states that "it is the intent of the Commission to encourage state divorce courts and attorneys handling marital dissolutions to consider earned pension benefits as divisible marital property." (Section V) Underlying the Commission's staff recommendation of pension splitting is its belief . . . "that a nonemployed

spouse whose share of marital community property has centered around home and children should not be left without pension income as a consequence of the divorce; particularly where pension benefits have been accrued during the marriage and credited to the employee's spouse." (Section I).

In summary, the national policy clearly favors the right of a former military wife to a proportionate amount of her former husband's military retirement benefits. Thereby the military wife whose marriage fails, who was prevented from earning her own pension while contributing to her husband's military career, will have a measure of financial protection in her old age.

CONCLUSION

Amici believe it important that the judgment below be affirmed for the reasons stated herein.

Respectfully submitted,

WILLIAM H. ALLEN
(Counsel of Record)
JEFFREY S. GERSHMAN
JOSEPH A. GODLES
STEPHEN J. NARKIN
Covington & Burling
888 Sixteenth
Street, N.W.
Washington, D.C. 20006
(202) 452-6192

Attorneys for Amici Curiae

TESTIMONY BEFORE THE
HOUSE ARMED SERVICES
SUBCOMMITTEE ON
MILITARY COMPENSATION

By Rep. Patricia Schroeder (D-Colo)

May 28, 1980

Thank you very much for the opportunity to testify before this Subcommittee on the plight of military former spouses, and in particular on my bill, H.R. 2817.

I applaud this Subcommittee for holding hearings on this matter. The issue raised is one for which serious consideration is long overdue.

When a military man divorces his wife, the wife not only loses a husband but also her claim to his military retirement pay and survivors' benefits. Under current law a divorced spouse is prohibited from receipt of retirement or survivors' benefits even when a marriage lasted 20 or 30 years.

The result: displaced military homemakers who have no claim to the retirement income that they have helped to earn.

The military former spouses' situation has been aggravated by recent social changes. First, the divorce rate has doubled in the last 10 years with the rate for long term marriages ending in divorce increasing substantially. Second, all but three states have moved to some form of no-fault divorce since 1974, with limited, if any, spousal support or alimony provided. Third, alimony is no substitute for a vested property right, since alimony ceases with the death of the wage earner.

Last May, I introduced H.R. 2817, the Military Retirement Income Equity Act to remedy the inequities military former spouses face. The

bill entitles a former spouse to a pro rata share of their spouse's retirement pay if the couple were married at least 10 years, awards a pro rata share of survivors' benefits to a divorced spouse, and makes survivors' benefits mandatory unless the employee and his spouse and or former spouse (if any) choose to waive the receipt of survivors' benefits.

H.R. 2817 is based on the premise that, among other things, marriage is an economic partnership and that a spouse makes a significant contribution to the military employee's ability to go through the ranks successfully, and consequently receive a pension.

This concept was recently acknowledged by the President's Commission on Pension Policy. In its interim report it recommended that pensions be

defined as a property right and that divorced spouses be entitled to a prorated portion of the benefits earned by their spouses during the marriage.

A couple marries and establishes a household, often deciding that the husband, who's in the Armed Forces will supply the family income and the wife will work in the home without wages and care for their children. They have established their economic partnership. It seems fair enough. Then, 20 or 30 years down the road, the couple decides to divorce, and suddenly the marital balance is tipped. The military retiree walks away from the divorce with a full retirement plan and the spouse, after putting in just as many years in the home as her husband devoted to the military, walks away with nothing.

We are a society which places value on home and family, encouraging women to stay at home and take care of their children. Yet, one of the most severe forms of economic discrimination is that we fail to attach an economic value to this service.

We give wonderful lip service to the reverence of the role of the woman in the home. The plight of the displaced military homemaker is an example of how in the home, a woman's role as housewife and mother receives reverence and honor -- but no monetary value. Unfortunately, the honor a woman gets for staying at home and raising children won't buy groceries, pay medical bills or send the kids to college.

Military wives know lots about honor. They have put up with

many difficult conditions for the good of their country. These spouses have traditionally contributed to the undertakings of the military, sharing the hardships of living abroad, with limited opportunity to maintain separate careers. They have been subject to the frequent uprooting that accompanies changes of duty station, irregular hours, and long periods of separation peculiar to military life. As THE AIR FORCE WIFE, a book by Nancy Shea published in 1951 stated, "...every Air Force Wife has 3 basic responsibilities: (1) to make a congenial home, (2) to rear a family of which he will be proud, and (3) to strengthen her husband's morale". Indeed, the armed forces have given retirement certificates to the wives acknowledging their years of service along with their husband's.

The legislation would award a pro rata share of the retirement benefits to a divorced spouse, male or female, married for at least 10 years. The exact amount of the former spouse annuity would depend upon the number of years of marriage that overlap with the credited years of service toward retirement. At a maximum, the former spouse annuity would amount to 50 percent of the retirement benefits, if married during the entire period of creditable work years.

Furthermore, the former spouse would be entitled to a pro rata share of the survivors' benefits, which would amount to the maximum 55 percent of the lifetime annuity if married during the entire period of creditable service. A surviving spouse would be entitled to benefits based on the number of years of marriage

during creditable service, as well as the remainder of the survivorship benefit not claimed by the first spouse, including credit for any years during which the employee was not married.

The legislation would make survivors' benefits mandatory unless the retiree, spouse, and former spouse (if any) elect out of the survivorship plan. While this step may be controversial, it appears to be necessary. First, many retirees are not fully aware of the consequences of their irrevocable decision at the time of the retirement, but when they later discover that they have made a mistake, it is loo late to rectify it. Second, widows, who discover after the death of a spouse that they have no survivors' benefits, write frantic letters to their Members of Congress, only to be

informed that under the law they are entitled to no benefits if their spouse opted out of survivors' benefits at the time of retirement.

As of September 1977, there were 1,155,000 military retirees drawing retired or retainer pay, and of that number only 55,446 provided survivors' benefits for their spouses. While more retirees have opted for survivors' benefits in recent years, the magnitude of the problem is evident when we look at the record in fiscal year 1976 when there were 64,000 military retirees, of which only 50 percent chose to participate in the survivors' benefit plan.

As a result, approximately 30,000 surviving spouses found themselves ineligible for survivors' benefits. While there is an actuarial reduction of retired pay during the retiree's

lifetime to pay for survivors' benefits, the amount of the reduction is minimal compared to the cost to the survivors of no benefits following the death of the retiree. For example, for the average enlisted man whose retirement pay equals $423 per month, the reduction for the survivors' benefit would be only $20 per month. For the average officer who receives $841 per month, the reduction would be only $62 per month.

Unlike civil service and Foreign Service members, military personnel do not pay into the military retirement system, although since 1957 members of the armed services have made mandatory contributions for social security coverage. While this gives military spouses and former spouses more protection than is available to spouses in other Federal retirement

programs, it is still not adequate protection. First, the former spouse cannot draw social security benefits, regardless of her age, until the military spouse retires and begins collecting social security benefits. Since military personnel frequently retire at an early age and begin another career at midlife, many work well beyond age 65, thus preventing a former spouse from receiving social security benefits.

Second, even if a spouse or former spouse is entitled to both social security and benefits through the survivors' benefits plan (SBP), dual benefits are not paid since the amount of social security attributable to the husband's military service is offset from the SBP payments. Third, social security was never intended to provide the sole retirement income to

a retiree or spouse, but to supplement other retirement income. In fact, those women who depend solely on social security subsist well below the poverty level of $2,900 for single older women, since the average payment for women is $2,676 annually or $223 per month.

I thought the subcommittee would find it interesting that the President's Commission on Pension Policy in its interim report recommended that survivor protection should be automatic for married and divorced spouses. To waive the benefit protection, both spouses should have to sign a waiver witnessed by the plan administrator or agent after having been informed of the provision by the administrator. For divorced spouses, the Commission recommended that the survivor protection should be prorated

based on years of pension service accrued during marriage.

The idea of a divorced spouse being entitled to her former husband's pension is nothing new. Under social security, if a wife has been married to a covered worker for at least 10 years at the time she is divorced, she will be entitled to a divorced wife's benefit or a surviving divorced wife's benefit. This is the same benefit which is provided to a wife or widow of a covered worker.

Other countries also recognize a former spouse's right to her former husband's retirement benefits. In the United Kingdom, any divorced individual is entitled to use the earnings records of the ex-spouse only for the time of the marriage in order to determine the first tier, flat benefit only. In West Germany, a 1977 law required that

the earnings credits accumulated during the marriage by either spouse are shared equally upon divorce. In 1978, Canada's social security pension system provided pension credits that were split equally in event of a divorce after at least three years of marriage. When the divorced spouse dies, the Swiss, British, and West German social security pension systems generally split the survivors' benefits between the divorced wife and the surviving wife on the basis of how long each was married.

I have also introduced legislation to amend the civil service and Foreign Service retirement systems with the same provisions set forth in H.R. 2817. The civil service bill, H.R. 2818, is still in the House Post Office and Civil Service Subcommittee on Compensation and Employee Benefits.

However, the Foreign Service bill, H.R. 2857, has been amended and included in H.R. 6790, the Foreign Service Act. The bill will go to the floor early this summer.

The Foreign Service provision as amended provided for a pro-rata division of retirement and survivor's benefits, based on the number of years of marriage, between the member of the Foreign Service and the former spouse. This pro-rata division was a presumption, subject to affirmation, modification, or vitiation by the state family law court. This bill gave the current spouse and former spouses of over ten years a right to sign off before the participant waived all survivor's benefits.

I mention this language because it may provide the route this subcommittee might want to go when

considering legislation surrounding this issue. The court order language in this provision permits the courts to vary the pro-rata share if there is overwhelming cause that it should be changed. The court would be allowed to make adjustments with the entitlement or vested interest. This provision would also permit spouses to make voluntary settlements or negotiate a settlement with the court when it would be to the former spouses' advantage to take cash or other assets in lieu of the pension benefits.

I think the pro rata presumption is important to set forth in federal legislation. Because of the variations in state domestic relations law, the pro rata presumption is needed to instruct attorneys and judges to consider the pension rights and needs of the individuals involved

in a divorce. Although precedent was set in California in a legal malpractice case which required a lawyer to pay his client $100,000 for failure to include the military pension as part of the marital property, most states do not have such incentives.

Moreover, there has been considerable confusion in the courts concerning the intent of Congress. The Supreme Court, in the Hisquierdo decision, interpreted the intent of Congress to prevent traditional community property state treatment of pensions as marital property. Therefore, it is imperative that there be a strong statement from Congress to clear up the confusion in the courts about Congressional intent regarding pensions.

I hope this subcommittee issues such a strong statement by adopting H.R. 2817. Many women are depending upon you.

JAN 9 1981

No. 80-5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,

Appellant,

vs.

PATRICIA ANN McCARTY,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIRST APPELLATE DISTRICT

Motion of the National Organization for Women Legal Defense and Education Fund (NOW LDEF), National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives, California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County (Ca.) for Leave to File Brief as **Amici Curiae,** and **Amici Curiae** Brief in Support of Appellee Patricia Ann McCarty.

* * *

Gertrude D. Chern, Counsel, Chern, Brenneman & Garcia, P.O. Box 667, Santa Maria, Ca. 93456, Telephone: 805-922-4553;

and

Judith I. Avner, NOW LDEF, 132 W. 43d St., New York, N.Y. 10036 212-354-1225

Isabel Marcus, 3304 Bridle Path, Austin, Tex. 78703, 512-476-3219.

Soma F. Baldwin, 301 J.E. Cook St., Santa Maria, Ca. 93454, 805-922-6155.

* * *

Gill Deford and Neal Dudovitz, National Senior Citizens' Law Center, 1636 W. 8th St., Los Angeles, Ca. 90017, Telephone: 213-388-1381.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for Amici Curiae listed below, certifies that the following listed organizations have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluate possible disqualifications or recusal.

National Organization for Women, Legal Defense and Education Fund ("NOW LDEF"), 132 West 43rd Street, New York, New York 10036,

National Center on Women and Family Life,

Women's Legal Defense Fund,

Older Women's League

Action for Former Military Wives,

California Women Lawyers, c/o Marjorie Holmes, Assoc. Dean, Golden Gate School of Law, 536 Mission St., San Francisco

Women Lawyers' Association of Los Angeles, c/o Evelyn Hutt, Amicus Curiae committee chairman, Beardsley, Hufstedler & Kemble, 611 West 6th Street, Suite 2220, Los Angeles, Ca. 90017

Queen's Bench of San Francisco, c/o Kathy S. Krohn, 1419 Broadway, Oakland, Ca. 94612

Women Lawyers of Northern Santa Barbara County, c/o Soma F. Baldwin, 301J E. Cook Street., Santa Maria, Ca. 93454.

by _____

Gerturde D. Chern, Santa Maria, Ca.

Judith Avner

Isabel Marcus

Soma F. Baldwin

Attorneys for Amici Curiae

also: Gill Deford and Neal S. Dudovitz
National Senior Citizens Law Center, 1636 W. 8th St., Los Angeles, Ca. 90017

QUESTIONS PRESENTED

Amici Curiae respectfully suggest that the Question Presented, in the light of the actual Case before this Court (Art. III, U.S. Constitution) is this:

HAS CONGRESS EXPRESSLY PRECLUDED THE STATES FROM DEFINING MILITARY RETIRED PAY AS "MARITAL PROPERTY" as between HUSBAND AND WIFE, FOR PURPOSES OF MARITAL DISSOLUTION ACTIONS IN STATE COURTS; CONVERSELY, HAS CONGRESS EXPRESSLY DEFINED MILITARY RETIRED PAY AS "SEPARATE PROPERTY" IN A MANNER DIRECTLY CONFLICTING WITH STATE STATUTES?

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No. 80-5

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,

Appellant,

vs.

PATRICIA ANN McCARTY,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

MOTION

The National Organization for Women Legal Defense and Education Fund ("NOW LDEF"), National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives; California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County (Ca.) respectfully move this Court for leave to file the accompanying brief in this case as **amici curiae**, on behalf of appellee Patricia Ann McCarty. They

concur, and incorporate by reference the **amicus curiae** brief filed by Jeffery Gershman, Esq., Covington & Burling, Washington, D.C., on behalf of various other **amici curiae** including the honorable Patricia Schroeder, Member of Congress.

The consent of the attorney for appellee herein has been obtained by NOW LDEF, but the attorney for appellant herein has refused to consent to the filing of a brief by the organizations and associations listed as the moving parties in this motion.

Applicants are concerned with prevention of damage to the concept that marriage is a partnership to which each spouse contributes by his or her industry, and that each possesses "an equal (or equitable) right to succeed to the property after dissolution . . ." Hisquierdo v. Hisquierdo, 439 U.S. at 577-8, commenting on community property law. Since Hisquierdo was briefed these concepts have spread throughout the land. Amici are therefore deeply concerned over the threat posed by appellant to that growing trend toward fair treatment of marital property, in new state laws and decisions.

Amici are particularly concerned with the threat of forfeiture of the wives' share of the only income-producing asset normally accumulated by military families: the retirement income. They are peculiarly aware of the potential poverty of military wives if they are thrust into an adverse job market in middle-to-later life with the lack of training in marketable skills which is characteristic of military officers' wives and without the retirement income which was part of the "deal" relied upon in any career-military-related life.

Amici are especially concerned that any denigration of the status of state marital law by pre-emption or otherwise, will have a disproportionately adverse effect upon women, now that the states have modernized their statutes, and eliminated most of the archaic disabilities formerly placed on married women generally. They also fear the cost and difficulties of litigating "support" if state property rights in retirements are confisticated.

Amici's attorneys who are from areas with large military installations (e.g., the Vandenberg Air Force Base area of California; also Texas) are also concerned over the potential unfairness to those many military ex-husbands who have treated their wives fairly by dividing the Retirement income without a battle. They are also aware that at bases such as Vandenberg, military personnel, federal civil servants, and employees of defense contractors work side by side on many projects, such as preparation for the Space Shuttle — yet they would each be treated differently in the state divorce court, should the decision below not be sustained.

Amici believes that their position will promote further harmony in military families and thus aid, not hinder, the morale of the persons on whom the defense of this country depends. They therefore respectfully request that the court allow the brief of these **Amici Curiae** to be filed.

Gertrude D. Chern,
P.O. Box 667, Santa Maria, Ca. 93456
Telephone: 805-922-4553;
Judith I. Avner, New York.
Isabel Marcus, Austin, Texas.
Soma F. Baldwin, Santa Maria, Ca.

Gill Deford and Neal S. Dudovitz
National Senior Citizens' Law Center,
Los Angeles, Ca.

Members of the Bar
of the United States
Supreme Court

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Motion of the National Organization for Women Legal Defense and Education Fund (NOW LDEF), National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives, California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County (Ca.) for Leave to File Brief as Amici Curiae, and Amici Curiae Brief in Support of Appellee, Patricia Ann McCarty.

STATEMENT OF THE CASE

Amici will reply upon counsel for the parties to present to this court an accurate general statement of the case, but will respectfully call to the court's attention the facts in the record specially pertinent to the points raised in amici's brief.

Richard and Patricia McCarty married while Richard was in his second year of medical school in Oregon (J.A. 32). Patricia was employed while husband studied medicine (J.A. 36, 41) but has not been employed outside the home since 1958. (J.A. 36, 41).

During their marriage and during military service, which Richard entered in his fourth year of medical school, the McCarty's lived in Oregon, Pennsylvania, Texas, Hawaii, District of Columbia, and in California on two different tours of duty. (J.A. 32). They had four children. (J.A. 2, 6, 7, 40).

Richard, a Colonel, and medical doctor, at age 42 (J.A. 40) ("Dr. McCarty" hereinafter) retired from active Army service September 30, 1978, and at his last post was Chief of Cardiology at Lettermen Hospital. He was licensed to praactice medicine in California. (J.A. 32, 41).

At the time Dr. McCarty filed his petition for dissolution of their 19-1/2 year marriage (J.A. 40), Patricia was 40 years old, was studying psychology at San Francisco State, needed 5 or 6 more years of schooling to obtain employment in her chosen field. (J.A. 41).

Dr. McCarty's petition listed all property acquired during the marriage by the efforts of the parties as his "Separate property." J.A. 2, 24); his theory at the trial court level is evidently based on alleged Oregon residence as governing the designation of property as between husband and wife. (J.A. 2, 45, Conclusion of Law #7, Juris.Stmt. 34, 48, 52).

From the court of appeal opinion, it would appear that federal preeemption of the Retirement was first raised at the appellate level. (Juris.Stmt. 57) (No finding of fact or conclusions of law are in the trial court record relevant to federal preeemption).

There were no income-producing assets of the marital partners other than the military retirement income rights. (See financial statements, J.A. 19, 20, 23, 24.).

QUESTION PRESENTED

Has Congress expressly defined military retired pay as the 'separate property' of the serviceman, as between himself and his wife, in connection with divorce actions —and in a manner contrary to state law?

SUMMARY OF ARGUMENT

Almost every state legislature has overhauled its domestic relations law, mandating equitable division of "marital property" in "divorce" cases. More and more courts are dividing military, federal civil service, and other retired pay in accordance with state definition and principles.

Priority of state law in the area of domestic relations, including dissolution of marriage and division of property accumulated by the parties during the marriage, has alwasys been a guiding rule of federal-state comity, absent express Congressional or Constitutional barriers.

Neither federal law nor prior decision of this Court preclude the states from applying their marital property laws, by equitable treatment of military retired pay, based on marital service, upon the dissolution of a marriage. **Hisquierdo v. Hisquierdo,** 439 U.S. 572, (1979) is limited by the unique statutory provisions and circumstances of the Railroad Retirement law. It does not apply to the retirement income of the McCarty's, based on 18-1/2 years of marital-military service.

State statutes and case law have grown to such magnitude in the field of retirement-income-division, that an adverse decision herein would inundate the states' family law courts, and would require the legislature to revise, once more, their interrelated systems of marital property and support. In Cali-

fornia, the definition and distribution of military retired pay as "community property", when based on service during marriage, is the product of a complex legislative system evolved over a century, and of case law interpretations of some forty years. The decisions fulfill the reasonable expectation of each marital partner: to share the assets accumulated during the marriage.

Military wives must contribute substantially to their husband's service careers; they are almost never free to pursue separate careers of their own. They will be severely disadvantaged if they are forced to forfeit to their husbands their share of the military retired pay on which they have relied, and which they have help to earn. Alimony, spousal support, welfare are not acceptable substitutes for property rights for most military wives; employment income will rarely be sufficient. If the wife's share of the military retired pay is forfeited to her husband, the divorce military wife will be unjustly deprived of income earned during decades of joint effort toward the family's economic future. Her prospects are then of repeated support litigation, even potential poverty.

Nothing in the federal scheme of providing retirement income for career military personnel requires such an adverse result. Military families secure in their planning for their economic future by the government's promise of retirement income, will remain secure and their morale strengthened by a decision sustaining the state court herein.

ARGUMENT I

APPELLANT'S CONTENTIONS CONFLICT DI-RECTLY WITH THE HIGHLY PURPOSEFUL STATE FAMILY LAW SYSTEMS

A. The California law he seeks to Abrogate is the Product of Over a Century of Complex Legislation, and is Based in Part on a Treaty Which is Entitled to Supremacy Protection.

Dr. McCarty demands from the California court, a "separate property" designation of military retirement income (J.A. 24) derived primarily from the years of service during his marriage to Mrs. McCarty — a definition directly contrary to the community property statutory system in California, where all property gained by effort during the marriage is "community".

The "separate property" definition he seeks, without which the court cannot set aside the entire retirement to him, has been expressly defined by the State Constitution and by statute, and interpreted repeatedly in numerous court decisions. The rights of the Wife which he seeks to have forfeited are property rights established by law far more ancient[1] than the federal statutes from which he draws his strained inferences of applicability to his divorce action.

California Civil Code §4800 ("CC" sometimes hereinafter) mandates equal division of community property.

Where the marital partners have been previously domiciled elsewhere (together) and have property which would have been community if acquired in California domiciliaries, it is "quasi-community property" under California law, and treated identically with "community". CC §4803. ". . . 'separate property' does not include quasi-community property." CC §4804. The common law states' definition of marital property — including the recent enactments —apparently have no definition whereby property acquired in other states is excepted from the property before the court at the time of the marital dissolution. In any event, most of the states of prior residence of the parties, as

listed in the Court of Appeal opinion, (Juris.Stmt. p. 54) now have, or in the case of Texas, have always had similar statutes.[2]

All property, support, and child-related rights between the parties in a marital dissolution action are governed by the California Family Law Act, 1969, Ch.1608, CC §4000-5174, under which Act Dr. McCarty brought his suit, and the Judicial Council rules concerning same, which include the "pleading" in the Joint Appendix. See Cal. Rules of Court, 1201-1295.30; financial statement, for example, at J.A. 17-28 is based on Cal. Rule of Court Form 1285.50; e.g., J.A. 20, "spearate property" where Dr. McCarty lists **inter alia,** as 'his' all the household furniture, and alleges: "there is no property subject to disposition by the court as community property".

Dr. McCarty asks this court to upset California's (and other states') "ingenious, complex, and highly purposeful distrbution of property rights between husband and wife . . ." **U.S. v Yazell,** 382 U.S. 341, 352 (1966).

Reservation of this area of law to the states, absent a direct contrary enactment by Congress was reaffirmed in 1979: **Hisquierdo, supra,** 439 U.S. at 581.

"Separate property" is "property owned before marriage or acquired during marriage by gift, will or inheritance". Cal. Constitution, Art.1, §8, 1974 Amendment; and is similarly defined in CC §§5107, 5108 (1969) — each carrying forward definitions from an earlier date. All other property is community, with minor irrelevant exceptions; presumption is in favor of "community", CC §5110. Third persons examining California property interests for commercial or other purposes, will find "community property" defined in the property section of the Civil Code, as "property acquired by husband and wife, or either, during the marriage, where not acquired as the property of either." CC§687, (1872). There have been no relevant changes in the definition of "community" or "separate property" between 1850 and 1980, in either the Constitution or the statutes; except that during World War II, a special section giving federal priority to title designations on U.S. Savings

Bonds, upon death of a party, was added. CC §704 (1943).

The military retirement income at issue was based on 18-1/2 years of marital service (J.A. 33); it was not acquired by "gift, will or inheritance". It cannot be "separate property" by definition.

Potential forfeiture-for-fault has been the former law. Marital "fault" was eliminated in the Family Law Act of 1969,[3] which also then mandated equal division of the community property. CC §4800. The only exceptions to equal division of community property (or quasi-) in the new Codes are for personal injury damages (with special protection to the community, however, for commingled funds, and for community contributions); CC §4800(c), CC §5126, for deliberate misappropriation of community funds, CC §4800(c)(2); for missing persons where the estate is under $5,000, §4800(b)(3); debts for education, §4800(b)(4).

The 1969 Act retained protections regarding retirement payments. CC §5106 (1969), ch. 1608, §8, 1976 Ch. 1164, §1.

Legislative enactments furthering distribution of court-divided retirement monies, have occurred in the face of a State Supreme Court decision adverse to the state's own financial interests: **Phillipson v. Board of Administration, Public Employees' Retirement System,** 3 Cal. 3d, 473 P. 2d 76, 89 Cal.Rptr. 61 (1970), wherein the Attorney General unsuccessfully opposed the wife's sharing in husband's State Retirement.

Congress has not responded to the many military retirement income distributions by the marital courts of Caliofornia and other states. See, e.g., **In re Marriage of Fithian,** 10 Cal. 3d 592, 599, 517 P.2d 449, 453 111 Cal.Rptr. 369 (1974). Counsel cannot locate any subsequent Congressional response adverse to **Fithian** and the many cases throughout the country which rely on **Fithian.** Congress has, conversely, specifically aided the enforcement of marital court decisions for support.. See **infra** at 20. It is presumed that the legislative body is acquainted with and has in mind, judicial construction of existing statutes. 73 Am.Jur.2d §164.

When Dr. McCarty chose to file his suit in California, and sought to benefit from its sexually neutral custody statute, CC §4600 (APP. Br. at 7), he bound himself by its entire Family Law Act. Further, he had had the sole power as between himself and Mrs. McCarty, to choose the place and mode of living, when they last moved to California, under then-existing Civil Code §5101, since repealed as of January 1, 1975. During their earlier tour of duty in California, if the wife did not conform to husband's choice of place and mode of living, "it [was] desertion". former CC §103. (Bender's Standard California Codes, 1968, Sgl. Vol.)

B **Appellant seeks to overturn established California Case Law.**

When Dr. McCarty filed in California, the decision of its highest court had been consistently contrary to his "separate property" contention: In re Marriage of Fithian, (1974) 10 Cal.3d 592, 517 P.2d 592, 111 Cal.Rptr. 369, cert.den. 419 U.S. 825, reh.den. 419 U.S. 1060; **French v. French,** (1941) 17 Cal.2d 775, 112 P.2d 235, 237, stated that only the "unvested" nature of the military retirement kept the court from treating the property as subject to division: **In re Marriage of Brown,** (1976) 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633, overrruled **French's** "unvested" limitation. In 1975, the Supreme Court of California held that omission of a military retirement in martial dissolution was attorney-malpractice, **Smith v. Lewis,** 13 Cal.3d 349, 530 P.2d 589, 596, 118 Cal.Rptr. 621 (1975) ruling that the community character of military retirement income had long been a matter of serious consideration in California.

Military retirement rights as divided by the California courts, have become well-established California property rights from **French** until the present day. The State's high court has affirmed in **In re Marriage of Milhan(I),** 13 Cal.3d 129, 528 P.2d 1145, 117 Cal.Rptr. 809, (1974) cert.den. 421 U.S. 976 (1975); **In re Marriage of Milhan(II)** (same Commander Milhan), 27 Cal.3d 765, 613 P.2d 812, 166 Cal.Rptr. 533,(1980)

cert.applied for again by Commander Milhan; **In re marriage of Stenquist,** 21 Cal.3d 779, 582 P.2d 96, 148 Cal.Rptr. 9 (1978); **Henn v. Henn,** 26 Cal.3d 323, 605 P.2d 10, 161 Cal.Rptr. 502 (1980) — "missed pension" still joint property. The court of appeal cases in California are too numerous to list in this brief; their results have long been final."[4]

C. **The Statutory Schemes of Almost all States now Define all Rights Acquired by Marital efforts as Marital Property, and by Statute and Case Law the Marital Property is Divided Equitably.**

1. Under Current State Statutes, the Retirement Herein Is Marital Property. It Cannot Be "Husband's Separate Property" and Wife Must Share.

Most non-community-property states have completly revised their statutory schemes regarding marriage and divorce, and property and support as between husband and wife. They have adopted definitions of marital property and "separate property" almost identical to California's, and, have adopted a rule of equitable distribution between the spouses of marital property.

New York (1980), Pennsylvania (1980), Iowa (1979), Minnesota, (1978), Illinois (1977) are examples. They all support Wife's position herein: that all "gains" during the marital period, including military retirement income, if based on marital-years-service, is marital property, and cannot be "separate" by definition. Only a handful of states are now contrary; all recent legislative enactments have been in the direction of greater fairness to the economically weaker partner, and reflect modern economic realities.[5] (No quasi-marital-property exceptions could be located.)

The only remaining states which do not appear to have modernized are Alabama, Georgia, Mississippi, North Carolina, Ohio, Virginia, and West Virginia — as of mid-1980; and some experts believe that among these states, greater equity is coming into marital court decisions, Freed & Jonas,[5] Tables IV A, B, C, D, 6 FLR 4050-4052.

2. Specific Statutory Schemes of Certain Major States Illustrate the Growing Trend in Favor of Wife's Position Herein.

Minnesota defines as "marital property", "vested pension benefits or rights acquired by the parties or either of them at any time during the existence of [their] marital relations . . ." Stats. 518.54 Subdiv. 5. (1978) Pennsylvania gives special weight to marital property treatment of military retirements by providing that certain special exempt Veteran's benefits are not "separate property" if obtained by waiver of a portion of otherwise marital-period retirement pay. Wests 1980 Penn. Acts 26, Ch. 4, §401.

New York's new statutory scheme mandates "equitable division", defining marital and separate property comparably to California.[6] Illinois Rev.Stat. 1977, Ch. 40 is similar, and Military retirement has been specifically defined as marital property and divided, in **In Re Marriage of Musser,** 70 Ill. App. 743, 388 N.E. 2d 1289, 1290 (1979); the decision holds **Hisquierdo, supra,** as inapplicable, **sua sponte.**

Under Iowa's new statutes distributing property rights as may be "justified" (§598, 1979), its Supreme Court sustained a small lump sum award to Wife representing her share in Husband's military retirement. **Schissel v Schissel,** 292 N.W. 2d 421 (1980), holding **Hisquierdo, supra,** inapplicable to military retired pay.

In the federal principality of the Canal Zone, where the statute provides for division of marital property in "just proportions" (Can. Z. Tit. 8, §239 (a), military retirement income was treated as marital property. **Bodenhorn v. Bodenhorn,** 567 F.2d 629 (5th cir. 1978).

ARGUMENT
II

EQUITABLE DISTRIBUTION OF RETIREMENT INCOME RIGHTS BASED ON MARITAL SERVICE IS SUPPORTED BY THE OVERWHELMING MAJORITY OF STATE COURTS—INCLUDING MILITARY WHERE THE ISSUE HAS BEEN PRESENTED.

A. Military retirement divisions are becoming the general rule.

Military retirement income between spouses in divorces, have been divided either "equally" or "equitably" or "justly" in Arizona, California, Idaho, Illinois, Iowa, Lousiana, Michigan, Missouri, Montana, New Jersey, New Mexico, Texas, Washington, and the Canal Zone.

The leading California cases are at page 8, 9 **supra.**

Texas statutory law permits no award of permanent alimony (Tex. Family Code Ann. §3.75 (1975), VIII, Martindale-Hubbell, 1981 at 2518). Its courts have consistly treated military retirement income rights as community property in cases dating back to the last century. Texas Supreme Court cases include: **Taggart v. Taggart,** 522 S.W.2d 422 (1977); **Cearly v. Cearly,** 544 S.W.2d 661 (1976); **Busby v. Busby,** 457 S.W.2d (1970).

Federal preemption based on analyses similar to Dr. McCarty's herein was rejected, and military retirements divided by Texas Court of Appeal in **Mora v. Mora,** 429 S.W.2d 660 (1968); **Ables v. Ables,** 540 S.W.2d 769 (1976); and **Dominey v. Dominey,** 481 S.W.2d 473 (1972), cert.den. 409 U.S. 1028. Community property treatment of grants for service to the Republic of Texas was allowed in **Kircher v. Murray,** 60 F. 48,

52 (1894) and **Barrett v. Spence,** 28 Tex.Civ.App. 344, 67 S.W. 921 (1902). There are many additional Texas court of appeal cases, dealing with many variations of the basic principle, a few of which are in footnote 7, **infra.** None of the cases hold contrary to Wife's position herein. The cases cited by Dr. McCarty in the Jurisdictional Statement at page 30 do not involve standard military retired pay.

Non-community-property state courts have ruled that military retired pay based on marital-years is "marital property". Illinois: **Musser v. Musser,** 388 N.E.2d 1289 (Ill.Ct.App. 1979); Iowa: **Schissel v. Schissel,** 292 N.W. 2d 421 (Sup.Ct.1980;) Michigan: **Chisnell v. Chisnell,** 82 Mich.App. 699, 267 N.W 2d 155 (1978) cert.den. 442 U.S. 940, (1979), New Jersey: **Kruger v. Kruger,** 139 N.J. Sup.Ct. 413, 354 A.2d 340; aff'd N.J. Supreme Court 375 A.2d 659 (1977); **Hipsley v. Hipsley,** 390 A.2d 1220 (N.J. Super. July 1978); distributes military retirement, denies distribution of Railroad Retirement **pre-Hisquierdo;** emphasizes that military retired pay is subject to income taxation, unlike Railroad Retirement. New Mexico ruled that Tennessee law mandated marital property treatment of a military retirement in **Stephens v. Stephens,** 595 P.2d 1196 (Sup.Ct. 1979).

State court judgments dividing military retired pay have been held entitled to full faith and credit (obviously in the face of vigorous attack), whenever ruled upon by appellate courts: Florida — **Williams v. Williams,** 338 So. 2d 869 (Fla.App., 1976); North Carolina — **Brown v. Brown,** 204 S.E. 2d 534, 537 (App. 1974); Oregon — **Schroeder v. Schoeder,** 533 P.2d 350, 352 (Sup.Ct. 1975).

Other community property states have also ruled that military retired pay is marital property: Idaho — **Ramsey v. Ramsey,** 535 P.2d 53, 56, 96 Ida. 672 (Sup.Ct. 1975), specifically finding an absence of Congressional intent to override state law, and holding that retired pay is based on past services. (Mrs. Ramsey, however, was awarded a judgment for a lump sum, instead of the usual monthly income-as-it-comes arrangement, and Husband

therein wiped out the judgment in the bankruptcy court, **Ramsey v. Ramsey,** 9th Cir. 612 F.2d 1220). Other community property divisions of military retired pay are: Louisiana —**Moon v. Moon,** 345 So.2d 168, 175-176 (Ct.App 1977), rejecting federal supremacy. New Mexico — **Stephens v. Stephens,** 595 P.2d 1196 (Sup.Ct. 1979); **Leclert v. Leclert, 453 P.2d 755 (Sup.Ct. 1969).** Washington —**Wilder v. Wilder,** 534 P.2d 1355 (Sup.Ct. 1975); **Morris v. Morris,** 419 P.2d 129 (Sup. Ct. 1966).

B. **The Viability of Adverse Decisions is Doubtful due to Statutory Changes.**

Because so many states have recently rewritten their marital law codes, the continuing effect of past decisions adverse to military retired pay division is doubtful. Arkansas rejected a military retired pay division in **Fenney v. Fenney,** 537 S.W.2d 367 (Sup.Ct. 1976); but its revised statute in 1979 requires equal division unless "unjust", as to all marital property. Oklahoma denied a lump sum award reflecting the community interest in the military retired pay, in **Baker v. Baker,** 546 P.2d 1325 (Sup.Ct. 1975), but its present statute requires "reasonable division" regardless of title, VIII Martindale-Hubbell, 1981, at 2096, 2104. Colorado denied division of military retired pay in **In Re Ellis,** 538 P.2d 1347 (Ct.App 1975), on the grounds that Colorado is not a community property state, but has since divided a State Employee's Retirement, **In Re Marriage of Camarata,** 602 P.2d 907 (Ct.App. 1979). Nebraska's Supreme Court denied division of military retired pay, because it was the source of the alimony awarded, in **Howard v. Howard,** 242 N.W. 2d 884, (1976.)

Alaska denied divisibility of marital property recognition of military pay in **Cose v. Cose,** 592 P.2d 1230, cert.pet. docketed 79-1499; primary basis of ruling was **Hisquierdo, supra,** and came down shortly afterward.

Alaska has awarded Wife an income based on vested federal civil service retirement, where Husband hadn't yet retired, **Malone v. Malone,** 587 P.2d 1167 (Alaska Sup.Ct. 1978).

The federal circuit court has upheld marital division of military retirement income for federal tax purposes, against the tax interests of the United States, in **C.I.R. v. Wilkerson,** 368 F. 2d 552 - a non-divorce case.

Indiana, Oregon and Wisconsin have divided other federally connected retirements, but have not ruled on military retired pay.[8]

Florida in **Bradley v. Bradley,** 385 So. 2d 101 (Fla. App. 1980) awarded permanent additional alimony, with fixed minimum amount - clearly a partial "division" of military retired pay.

C. **Former Common Law States are Starting to Divide Retirements as the Case Arises.**

Non-federal retirements were distributed equitably in Delaware Hawii, Kentucky, Minnesota, and Tennessee.[9]

Other former common law states whose appellate courts have rendered decisions dividing retirement rights or establishing general principles indicating inevitable divisibility treatment of retirements: Nebraska: **Torrey v. Torrey,** 206 Neb. 485, 293 N.W.2d 402 (1980) — holds that "title" is irrelevant; Kansas: **Smith v. Smith,** 612 P.2d 1257 (1980) — divides equitably all property of parties, regardless of when acquired. Indiana: **Irwin v. Irwin,** 406 N.E.2d 317 (Ind.App. 1980) — gives consideration to future retirement in calculating property division; Kentucky: **Foster v. Foster,** 589 S.W.2d 223 (Ky.App. 1979) — non-contributory retirement plan is marital property in divorce division.

The weight of authority shown by this section is such that voluminous state legislative and court problems would arise, were the decision herein now reversed. The legislatures and Congress are presumed to be acquainted with court decisions — particularly when as numerous as has been shown in this section of the brief. 73 Am.Jur. 2d §164, Statutory Construction. Congress' inaction, combined with the positive action of the legislatures in the direction of defining retirements as marital property, and equitable distributions of such property, demonstrates that Congress has not intended to interfere with these state trends.

ARGUMENT
III

THE FEDERAL GOVERNMENT HAS CONSISTENTLY GIVEN GREAT WEIGHT TO STATES' INTERESTS IN THE MARITAL PROPERTY RIGHTS OF THEIR CITIZENS. THE FEW EXCEPTIONS DO NOT APPLY HERE.

A. **The long established Federal Policy is to Leave Marital Law to the States.**

> ". . . [T]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States," said this Court in rejecting a foreign diplomat's attempt to litigate his divorce in federal court. **Ohio Ex Rel. Popovici v. Alger,** 280 U.S. 379 (1930), **Hisquierdo, supra** at 581.

Only when Congress has "positively required by direct enactment" that state [family] law be preempted, will state law be overridden. **Hisquierdo, supra,** 439 U.S. at 581. As this court said in a commercial - lien priority context (hence not subject to potential relitigation between the same parties throughout the duration of their lives):

> "Because the ultimate consequences of altering settled . . . practices are so difficult to foresee, we hesitate to create new uncertainties in the absence of careful legislative deliberation."

United States v. Kimbell Foods, Inc. 440 U.S. 715, 739, and citing **Yazell,** The **Kimbell** court also ruled, **supra,** at 740:

> ". . . the prudent course is to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation." **supra,** at 740.

B. **Hisquierdo Applies Only to Railroad Retirement.**

This Court, in **Hisquierdo, supra,** found that Congress had specifically determined the manner in which Railroad Retirement would deal with the rights, if any, of divorced spouses of its

members. **Hisquierdo, supra,** at 584-5. Congress's enactment with respect to the relationship between Railroad Retirement and divorce, was the result of special labor-management negotiations, **id.** at 585. None of this unusual divorce-related specificity can be found in military retirement law.

Taking a nation-wide view of the equities between the **Hisquierdo** parties' in the light of the many current statutes mandating equitable division of marital property rights **supra,** at 9 we find the **Hisquierdo** decision would not be in conflict with the "equitable division" statutes not true with respect to the McCartys, were Dr. McCarty to be granted the relief he seeks. The Hisquierdos waived any claims that Angela's Social Security could be divided. Only she had Social Security entitlement. Jess had Railroad Retirement; it is in lieu of Social Security. While their dollar entitlements are unknown, facts recited indicate that between these particular individuals, equity may have been done. (Nothing noted herein is intended to derogate the legal position taken in **Hisquierdo** by some of the **amici** herein, since many Railroad ex-wives may have lost the only retirement benefits they would otherwise receive. Few may have had Angela's long employment history.) As this Court noted, in commenting on the equities in the Case before the Court (Art. III, U.S. Const.), "[she] wants the house" (439 U.S. at 588) - and under the facts she could get it only if Jess were charged with a lump sum in exchange for "her" share of the Railroad Retirement."

The contrast between the Hisquierdos and the McCartys dramatizes the inequities which could occur were Dr. McCarty to prevail herein; an inequity which would result in almost all military officer retirement cases. Military officer spouses, unlike Angela Hisquierdo, cannot normally accumulate an employment history; wives of enlisted men would also have more limited outside employment opportunities. See 23 infra. Angela, unlike

Patricia herein, has no "reliance damages". No nation-wide reliance on division of Railroad Retirements exists, unlike that in military retirements. Texas rejected divisibility of Railroad Retirement in **Berg v. Berg,** 115 S.W. 2d 1171 (Tex. Civ. App. 1938). The Texas Supreme Court, in **Eichelberger v. Eichelberger,** 582 S.W. 2d 395, reh. den. (May, July 1979) made clear the inapplicability of state law to Railroad Retirements following **Hisquierdo.** However, no Texas appellate court had ever specifically ordered a division of Railroad Retirement, though **Allen v. Allen,** 363 S.W. 2d 312, 314 (Tex. Civ. App. 1962) had indicated that only lack of 'vesting' prevented marital division. **Allen** is now overruled.

New Jersey's Supreme Court held that federal supremacy barred state treatment of both Social Security and Railroad Retirement, but that military retirement was divisible marital property, in **Hipsley v. Hipsley,** 390 A. 2d 1220. (1978)., prior to **Hisquierdo.** Counsels search has disclosed no state cases actually dividing Railroad Retirement pay.

Several state Supreme courts, other than California's, have capably analyzed **Hisquierdo's** inapplicability to military retired pay distribution in marital dissolutions then divided the military retirements. By way of example only, **Miller v. Miller,** 609 P. 2d 1185, 1187 (Mont. Sup. Crt 1980) with a careful analysis; **Czarnecki v. Czarnecki** 600 P. 2d 1098 (Ariz. Sup. Crt. 1979).

Finally, efforts by Husband to put Wife into the category of a commercial creditor, instead of that of a person who shared in the acquisition of the property - for that is the effect of arguments concerning "assignment", "garnishment" and the like, - represent a most unfair denigration of the efforts and services of the spouse during husband's military service.

C. The Wissner Cases Are Not Authority For Forfeiture of Income Rights Based on 18 1/2 Years Of Marital - Military Service.

Appellant attempts to build certain cases into an insur-

mountable barrier to the many states' division of military retired pay based on marital service: **Wisner v. Wissner,** 338 U.S. 655 (1950); **Free v. Bland,** 369 U.S. 663 (1962); **Yiatchos v. Yiatchos,** 376 U.S. 306 (1964); and **McCune v. Essig,** 199 U.S. 382 (1905). None relate to equitable treatment of marital property in divorce. Both **Wissner, supra,** and **Free v. Bland, supra,** support Mrs. McCarty's position herein, for they require a clear federal mandate before state family law schemes will be pre-empted; they also suggested the parties return to the state courts for application of state law, to determine any actual deprivation of marital property rights between husband and wife.

In **Wissner,** the contestants were the ex-wife and mother-beneficiary of the deceased Major Wissner in a battle over insurance proceeds, which became available as a result of Major Wissner's death. Major Wissner had paid the premiums for what was apparently term insurance, from earnings after his separation from Mrs. Wissner some years before his death. These premiums would now be his "separate property" under Cal. Civ. Code §5118, because paid by post-separation earnings, and in California now the 'widow' would have no claim. Additionally, **Wissner** reserved the issue as to wife's entitlement to the return to her of one-half the premiums paid from his earnings, thus giving state law priority as to all issues except the beneficiary designation specifically mandated by Congress during World World II. 338 U.S. 655, 660.

The life insurance proceeds, in any event, more nearly resemble personal injury damages than lifetime retired pay; and personal injury damages in California are subject to statutory exceptions from the equal division requirement. C.C. §4800.

In **Free v. Bland, supra,** this Court expressly gave priority to state law as between husbands and wives, by leaving to the contestant, the opportunity to litigate in the state court any issue as to whether the surviving husband may have defrauded his late wife of her property interest in the war bonds. **Yiatchos, supra,** also held that title designations on U.S. War Bonds may not be

used as an instrument whereby one spouse may defraud the other of property rights under state law, in another contest between a surviving spouse and an heir. **McCune v. Essig, supra,** supports state property law over federal homestead law, in a contest between a widow and surviving child.

D. **The Federal Government Has Subordinated Its Direct Interests To Avoid Conflict With State Marital Law Systems.**

United States v. Yazell, supra, is a clear example of subordination of direct federal interest (collection of money due it) to an archaic state law protection of the separate property of married women.

There have been similar state supportive decisions related to federal taxation, though the national interest requires money to run the government and pay for military defense. Thus, community property law whereby each spouse was deemed to have earned one-half the income, entitled the marital partners to "income-splitting', thus reducing federal tax income. State designation of such income was upheld by this Court in **Poe v. Seaborn,** 282 U.S. 101 (1930); even though the result was a lack of uniformity of federal taxation of married persons between the various states, - a problem which continued until joint tax return legislation was ultimately enacted in 1948.

In **C.I.R. V. Wilkerson,** 368 F. 2d 552, supra., where the taxable income in question was military retired pay, the court permitted the couple in a community property state to treat the income 50/50, for tax purposes though only one of the parties served in the military, bowing to state marital property definitions.

Where the highest court of a state has made a determination as to ownership of a property interest, that decision controls in the federal courts for federal tax purposes. CCH 1980, Community Property ¶325.01 **Commissioner v. Estate of Herman J. Bosch,** 387 U.S. 456, 11 L. Ed. 2d 886, 87 S. Ct. 1776 (1967).

Says the Internal Revenue's Service Publication 555 (1979) "Community Property and the Federal Income Tax:

> The law of the State in which you are domiciled governs whether you have community property or community income."

This together with **Wilkerson, supra,** shows that the federal courts regard the spouses as Co-owners of military retired pay. And section I-C of this brief shows the growing number of the states to say so specifically in many instances, impliedly in almost all others.

The federal government has made enactments intended to make effective state court division of federal Civil Service and Foreign Service retirement pay, 5 U.S.C.A. §8345 (j) (7) 1978 Pub. law 95-336; Exec. Order No. 12145 (July 18, 1979, 44F.R. 42653, under authority of 22 U.S.C.A. §1065.

The disproportionate volume of military retired pay litigation (compared to that concerning federal Civil Service retirements), the vehemence and persistence of those military retirees who continue to attack retired-pay-sharing in the face of repeated court decisions adverse to their position, and in the face of increased statutory preference for "equitable division" -indicate a possible reason why Congress has not yet acted to aid in effectuating state judgments dividing military retirements; conversely, Congress has remained aloof these many years from enactments contrary to the states' decisions.

See, e.g. **Milhan I** and **Milhan II, supra; Fithian I, supra,** and **Fithian II,** 74 C.A. 3d 397 (1977); **Ramsey v. Ramsey, supra,** where after the Idaho Supreme Court gave wife a share reduced to present value, Husband moved to California, discharged the judgment in bankruptcy court.

It should be noted, in dealing with federal-state comity in this field, that federal retirement income for its personnel are so

entwined, that in computing years of government service in Civil Service retirement, credit is given for Government, executive, judicial, and legislative, and including the military. 5 U.S.C.A. § 8332 (a) (b), 5 U.S.C.A. §2101 (1), 5 U.S.C. §8332 (c).

State community property laws are specially accommodated in the Bankruptcy Act, 11 U.S.C.A. §1 et seq; §101 (6); §726 (2) (A); §541 (2); §524.

The Employment Retirement Income Security Act, 29 U.S.C.A. §1132 ("ERISA") created substantial federal involvement in private pension plans, but state and federal courts alike have consistently rejected repeated efforts to eliminate the spouse's share - by claiming ERISA constituted a federal preemption, removing all private pensions covered by the Act from state marital courts. See. e. g. **Carpenter Pension Trust v. Kronschnabel** (C.D. Cal. 1978) 470 F. Supp. 978. The cases are too numerous and the issue too tangential for inclusion in this brief; but **Kronschnabel** is additionally helpful because it held that a marital distribution of a retirement income is not an "assignment".

The preamble to ERISA emphasized the public concern for the continued well-being of employees and their dependents who are directly affected by the pension plans covered. The continued well-being of military personnel and their spouses should be similarly secured from fear of loss of retirement income; "loss" and "fear" are the issues, whether the cause be funding, denial of vesting, or marital discord. In the military, fear of such loss could create the very discord which could lead to divorce; could create family disharmony, hindering successful service by the military serviceperson.

This Court spoke strongly to the issue of honoring state commercial and property law (priority of liens), when direct federal financial interests would be damaged, in **U.S. v. Kimbell Foods,** Inc., 440 U.S. 715 (1979), relying in part on the precedent of the **Yazell, supra,** a state family law preference case. Family law is even more peculiar to the states than commercial law, which, unlike family law, had status in the U.S.

Constitution itself. How much more forceful, then, is the case for priority of state interests when neither Constitution nor federal statutes have ever declared any federal law of marital property and marital dissolution.

ARGUMENT
IV

A RULING OVERTURNING THE MANY STATES' STATUTES AND CASES DIVIDING MILITARY RETIRED PAY IN MARITAL DISSOLUTIONS WOULD SEVERELY DISADVANTAGE, EVEN IMPOVERISH, THE GROWING NUMBER OF DIVORCED MILITARY WIVES. IT WOULD ALSO CONFLICT WITH THE PUBLIC POLICY OF INVOLVING WIVES IN THEIR HUSBANDS' MILITARY CAREERS.

Preliminary Note:

Because Dr. McCarty concentrated his "separate property" "husband take all" contentions at trial on the claim that the property was that of a non-California domiciliory (J.A. 45, Concl. of Law #7, Juris.Stmt. 34, 48, 52) there are no trial court findings of fact or conclusions of law concerning "federal preemption"; hence, no special evidence was introduced in the record concerning Patricia's reliance on sharing the retirement, her personal sacrifices, or her contributions to the military service life of the parties. Much can be inferred from the number of moves, number of children, rank of her husband, and the lack of accumulation of any income-producing assets in this almost-20-year marriage. **Amici** therefore ask the indulgence of the court in their presentation of material describing the roles of military wives generally, officers' wives particularly. In any event, the decision in this case will affect all former spouses of military personnel, and all persons who will become ex-military-spouses.

A. **The Military Wife Contributes to National Defense.** "... [E]very Air Force wife has three basic responsibilities: (1) to make a congenial home; (2) to rear a family of which he will be proud and (3) to strengthen her husband's morale..." "... most of us are familiar with the old saying that 'an officer's success depends on his ability, his conduct, and his wife.' "[10]

The Air Force issues a formal retirement certificate to an officer's wife:

> "On the occasion of the retirement of her husband from active duty with the United States Air Force has earned grateful appreciation for her own unselfish, faithful and devoted service. Her unfailing support and understanding helped to make possible her husband's lasting contribution to the Nation."[11] Air Force Form 1346, Nov. 1970.

B. **The Wife's Military-Related Duties are Substantial. The Military is Geared Toward the Wife as Part of Its Establishment.**

An officer's wife is required to carry out social, personal, and other requirements in connection with her husband's military position. If she does not, he can suffer a lower efficiency rating and his promotions and assignments can be adversely affected.[12] Her fulfillment of her supportive role is therefore often related to the ultimate rank on which the retirement income contested by Dr. McCarty is based.[13] An overview of the total immersion of an officer's wife into the military-service-world is set out in footnote #14.

The military involvement in family life is further indicated by the provision of family housing on most bases, (J.A. 32) money allowances for family quarters, financial and health service benefits for the whole family, (J.A. 36, 42); relocation allowances for family moves. 37 U.S.C. § § 406, 407. Extra financial allotment for the family is granted where the husband is assigned to a station where families cannot join him. 37 U.S.C. § 427.

C. The Divorced Wife, Particularly Where the Military Retirement Entitlement Period Has Been Reached (or Nearly Reached, as Here) is in a Particularly Adverse Economic Situation if her Share of the Retirement is Forfeited.

"[Most wives] who have spent their married years as a homemaker and mother may, despite [their] best efforts, find it impossible to re-enter the job market." **In re Marriage of Morrison,** 20 Cal.3d 437, 453, 573 P.2d 41, 52, 143 Cal.Rptr. 139, (1978), a 28-year marriage, much of it in the military, husband "retired" to a $1500 a month civilian job; whereas at age 54, the untrained Mrs. Morrison earned only $100 a month. See also **Kahn v. Shevin,** (1974) 416 U.S. 351, 354, as to the limited job market for older women.

While the military wife is primarily engaged in raising a family, handling the many moves, maintaining a home, the military man is often receiving training which will benefit him in civilian employment.

In the case at bench, appellant was a second year medical student (J.A. 32, App.Br.7) when they married; Patricia worked so Dr. McCarty could continue his medical studies. (J.A. 64, 41).

Dr. McCarty entered active Army duty during his fourth year of medical school (J.A. 32), advancing to a Board Certified Internist and Cardiologist. (J.A. 41). He was Chief of Cardiology at Letterman Hospital (J.A. 32) prior to his retirement. His earnings potential is dramatically different from Patricia's who faces years of training. She has not worked outside the home since 1958 (J.A. 41), needs six more years of training for her chosen field of psychology. (J.A. 41). The trial court recognized that Dr. McCarty's professional level was such that he could go into private practice and support himself without waiting for the military retirement to mature. (J.A. 60-61). He served out his twenty years and began receiving retired pay of $1,507.86 —

plus the usual non-cash benefits, such as health care available to retirees. (J.A. 36, 42)

The "training" given military officer's wives, is singularly irrelevant to the modern labor market. See, e.g., the instructions as to a wife's performance in connection with "Invitations and Acknowledgements", "Formal and Official Luncheons and Dinners", and the like activities in a guide for the "day in, day out life of most commissioned officers' families." **The Officer's Family Social Guide,** Gross, Beau Lac. Publ., L.C. No. 77-72724, 1977, pp.2, 13, et.seq.

The opportunities for military homemakers to obtain reasonable outside employment and training are necessarily limited. The average number of moves during an average of 19.8 years of military service was 11.4 times.[15] The McCarty's herein also moved frequently. (J.A. 32)

It should be noted, in the emphasis placed herein on "wives" that almost all ex-military spouses, especially of retirees, are likely to be women. This court found as fact in 1973 that 99% of all military personnel were then men. **Frontiero v. Richardson,** 411 U.S. 677, 681 (1973), see also **Personnel Administrator of Massachusetts v. Feeney,** 442 U.S. 256, 99 S.Ct. 2282, 2291 and fns. (1979).

Organizations are being established among former spouses of military personnel to assist them in coping with the problems they must specially confront as a result of divorce from a military person.[16]

It is obvious that civilian employment opportunities are poor for a person subject to frequent moves. Military couples have limited opportunmities to make investments, such as in real estate, to provide for after-retirement income for the non-military spouse. It would surely be no advantage to the military establishment if the wife (or both marital partners) had to concentrate on accumulating a source of alternative income for wife's later years; the spouses need to "pull together" to further the military member's career and the government pays for such restrictions on outside economic effort by providing the early and substantial retirement income.

The cases also indicate how often the only income-producing asset in military divorces is military retired pay. Examples: **Miller v. Miller,** 609 P.2d 1185 (Mont.1980); **Bradley v. Bradley,** 385 So.2d 101 (Fla.App. 1980); **Musser v. Musser,** 388 N.E.2d 1289 (Ill.App. 1979); **Light v Light,** 599 S.W.2d 476 (Ky.App. 1980); **Spencer v. Spencer,** 589 S.W.2d 174 (Tex.Civ.App. 1979); and in the case at bench. (J.A. 19, 20, 23, 24)

D. **Military Ex-Wives Affected by This Case are Particularly Likely to be Severely Disadvantaged. They Face Great Risk of Poverty Now and in Their Remaining Years.**

The divorced military wife, if she is fortunate enough to obtain paid employment, is faced with the low-level job classification and poverty pay levels which still afflict much of the female work force; hence the great need to share in the military retirement income. The statistics available concerning divorced women in the labor make it clear that a far greater percentage of them are (and presumably have to be) in the labor force, at whatever jobs they can get — than women who have husbands. U.S. Department of Labor, Bureau of Labor Statistics, **Perspectives on Working Women: A Data Book,** Bulletin 2080, October 1980.

Employed women are concentrated largely in the lower paying occupations. In 1973, more than two-fifths of all employed women were concentrated in ten occupations: secretary, retail salesworker, bookkeeper, worker in private household, elementary school teacher, waitress, typist, cashier, sewer and stitcher, and registered nurse. U.S. Department of Labor **Handbook on Women Workers,** 91-92 (1975). There is evidence that the occupational segregation is increasing. For example, in June 1978, 97% of all clerical workers were women, as compared with 62% in 1950. U.S. Department of Labor, Bureau of Labor Statistics, **Employment Perspective: Working Women** (Report No. 544, 1978). $59 per week to $170 per week was the range of 1977 weekly wages for these

job categories except teacher and nurse. U.S. Department of Labor, Bureau of Labor Statistics, **News: Trends in Hourly Earnings for Major Labor Force Groups,** Tables 1-3 (Nov. 2, 1977). The 1977 average weekly wage for male-dominated jobs not requiring higher education, such as transportation and public utilities was $275 and construction $297. U.S. Comm'n on Civil Rights, **Women Still in Poverty,** 19 (July 1979).

In 1979, more than one half of the employed divorced women were wmployed in the lower paid classifications. U.S. Department of Labor, Bureau of Labor Statistics, **Perspective on Working Women: A Data Book,** Bulletin 2080, October, 1980, p. 24 (Table 23).

In 1977, women clerical workers had a median income of $5,365 less than male clerical workers; female retail trade salesworkers earned $5,581 less than male retail trade salesworkers; and female food service workers earned $2,077 less than male food service workers. **Women in Poverty** at 19.

E. **"Alimony" is Not a Reasonable Substitute.**

In Texas, the court may not award any permanent spousal support or "alimony". Texas Family Code Ann. §3.65 (1975); Martindale-Hubbell, VIII, 1981, at 2518. Thousands of retired military live there; 57,000 from the Air Force alone. footnote 4 **supra.**

Texas, like California, has a multitude of published decisions dividing military retirements. The parties concerned have justifiably relied on property rights based on these decisions. See Section II.A of this brief. The Texas Code requires that the marital estate of the parties be divided "in a manner that the court deems just and right", taking into consideration the rights of the parties. See, **U.S. v. Stelter,** 567 S.W.2d 797, 798, reh.den. July, 1978.

If the military retirement is removed from the family property division, then many cases will have to be retried. Additionally, there will be the problem of the offset forbidden in **Hisquierdo,** 439 U.S. 572, 99 S.Ct. 802, 811-812 (1979); wherefore, Texas,

like other states, will have to rewrite its marital law entirely to accommodate any changes resulting from a reversal in the case at bench.

In "alimony" states, statistics indicate the inefficacy of such awards. Non-compliance with support is common, even regarding child support, where the legal "muscle" is far greater.[17] Support amounts, if paid, are often such that the families relying on "support" are at or below the poverty level.[18]

While Social Security will ultimately provide some for older divorced wives, who qualify for benefits based on their ex-husband's service,[19] these women must wait for the ex-husband to either reach age 62 or 65,[20] and make claim for the benefits; before the ex-wife can file for dependent ex-spouse benefits, she herself must reach age 62 to qualify.[21]

Since the average age of a former military wife was 51.7 years, according to one study,[22] the former military wife must often wait some 10 years for eligibility regardless of need.

If the divorced former military wife gains her own Social Security coverage through employment, her Social Security income will reflect the cumulative impact of past sex discrimination in jobs, pay and promotion, characteristic of all women, but she, in addition, will face the specially detrimental effects of late entry into the labor force, the likelihood of being forced into lower paying jobs, such as Mrs. **Morrison, supra.**

For all working women retiring on their own Social Security in November, 1980 the average benefit for women was $100 less than that for men — a high proportionate difference. [23]

F. Even "Veterans" Preference is Set Up To Deny Ex-Military Wives a Fair Opportunity in the Labor Market.

Ex-military wives competing for jobs in Massachusetts, for example, find that the absolute preference given there to Veterans "has a devastating impact on the employment opportunities for women." **Pers. Adm. of Mass. v Feeney, supra,** ("Feeney" hereafter) (and see fn. 7 at 2286 and sources cited describing the extent of veterans preferences throughout the

country). Unremarried widows of veterans may be eligible for preference — but not unremarried ex-spouses of deceased veterans, no matter what the length of marital service to the veteran. **Feeney, supra** fn. 10. The directly adverse impact on women is set out at 2291-2 and fns. Where women got public employee jobs, the positions were so low paying that male veterans had not applied at all. **Feeney** at 2291, and fn. 22.

It would be ironic if Patricia McCarty were to be deprived of her share of the retirement pay, acquire a profession, nevertheless, and then ultimately find herself thwarted in employment efforts by preference to a lower scoring veteran who is himself enjoying a retirement income which the job income would supplement.

For ex-military wives whose former husbands are not cardiologists reachable for support, the potential adversities on this issue alone, dramatically illustrate the cumulative unfairness. They also demonstrate yet another area of state statutory revision which an adverse decision herein would necessitate.

CONCLUSION

Reversal of the state courts' decision, and of the state law on which it is based, would result in manifest injustice to thousands of women. There is no clear basis in Congressional enactments or federal decisions on which to reverse this individual decision. There is no Congressional mandate to reverse the state policies overwhelmingly enunciated in the statutes and decisions. These are policies of justice and fairness; they are good law; they should stand.

Respectfully submitted,

by _____
Gertrude D. Chern, Santa Maria, Ca.
Judith Avner
Isabel Marcus
Soma F. Baldwin
Attorneys for Amici Curiae

FOOTNOTES:

1. The system of marital "acquests and gains", now called "Community Property" was brought to Spain by the Visigoths in the 7th Century; thence to the New World by Spain. It was the established marital property system of the California territory of Mexico, and continued after freedom was won from Spain. The existing property system was then guaranteed to the inhabitants of California and the Southwest under the Treaty of Friendship, Limits and Settlement with the Mexican Republic, Guadalupe Hidalgo, Feb. 2, 1848. California's original Constitution in 1849 (Art. XI, §14) expressly defined a wife's separate property and provided for further specificity of the common property system; husband's separate property rights were expressly set out in California's original statutes of 1850, and equal division of common property upon divorce was mandatory. Act of Apr. 17, 1850, Ch. 103 §12, Cal.Stat. 255. See 1 DeFuniak, **Principles of Community Property,** 1st Ed., 1943, 72-73, 106-113, 2, Ibid at 517; Prager, **The Persistence of Separate Property Concepts in California's Community Property System,** 1845-1975, 24 UCLA, 6-10, and sources cited therein.

California's Constitution was expressly accepted by Congress in the Act admitting California to the United States, Sept. 9, 1850, Pub.Law 453-2, 31st Cong.1st Sess., Acts of 31st Cong. 51-2.

2. Before current California domicile, 5 yrs. in Texas, 4 years in California, 2 yrs. in District of Columbia, 3 years in Hawaii, 1 in Pennsylvania. (Juris.Stmt. 54).

3. The Family Law Act, Stats. 1969, Ch. 1608, was the result of years of study and hearings, first by a "blue ribbon" commission, then by legislative committees; the work began in 1966 and was signed into law in 1969. Comparative analysis of the sections, before and after the Act, shows no substantive changes in definitions of "community property", "separate property" nor the definition or effect of "quasi-communtiy property". Attorneys Guide to Family Law Act Practice, Calif. Cont. Ed. of the Bar, Regents of the Univ. of Calif. LC 79-628503, p. 113; and tables therein.

4. The Texas cases are also numerous. Infra p. 11. Of Air Force retirees alone, California now has 61,000 and Texas 57,000. Yet the Air Force is the youngest of the services, hence probably has the fewest retirees, especially of older years. U.S. Air Force **News for Retired Personnel,** AFPR 30-16, Vol.22, No.5, Sept-Oct 1980, U.S. Govt. Printing Office, 1980, 677-136/1. The potential volume of incomeless ex-wives, could present a serious problem for state courts faced with new support actions, and a potential burden on all state services.

5. See "Divorce in the Fifty States". An Overview as of August 1, 1980, Free and Foster, Family Law Reporter, Bureau of National Affairs ("FLR"), Vol.6, No. 42; 6 FLR 4043 et. seq.; with useful tables of states; Table XII, A, B at 3061-3 gives a quick review of state division of retirement incomes generally. See also, Martindale-Hubbell, Law Directory, Vol. VIII, 1981 for summaries of the existing laws of the states, particularly as to each state, the sections on "Divorce" or "Dissolution of Marriage", "Husband and Wife".

6. Ch. 281, McKinney's Sessions Law of New York, 203d Session 7-9-80, Part B-5.

7. **Kirkham v. Kirkham,** 335 S.W.2d 393 (1960) (retired pay principal asset); **Miser v. Miser, 475 S.W.2d 597 (1971) (community property designation even though the military man had** to re-enlist after martial separation before vesting would occur; **Browder v. Browder, 573 S.W.2d 878, hrg.den. (1978), (distributing previously "missed" retirement pay); similar result in Cruse v. Cruse,** 572 S.W.2d 68, (Oct. 1978). **Spencer v. Spencer,** 589 S.W.2d 174 (Oct. 1979), (presents unusual facts, the couple having been once divorced, remarried, litigated effect of remarriage) **Spencer's** facts also illustrate dramatic differences in the economic positions of the spouses: Husband had military retirement income of $673 a month at the time of second divorce; had almost 20 additional years of federal civil service, at $15,000 a year earnings and will get additional civil service retirement pay. Wife earns $625 per month and loses her military medical benefits. 589 S.W.2d 175-6. See also, the annotation in 94 A.L.R.3d 176, et.seq. and Texas cases **passim.**

8. Indiana: **Lubunao v. Lubunao,** 388 N.E.2d 574 (Ind. App. 1978) (Keogh); Oregon: **Rogers v. Rogers,** 45 Ore.App. 885, 609 P.2d 877, 879 (1980) (foreign service — almost 100% abroad); Wisconsin: **Shafer v. Shafer,** 3 Wisc.2d 166, 87 N.W.2d 803 (1958) (Post office).

9 Delaware: **P.V.P.,** Case No. 2308-77) 7/19/78; at 6 FLR 4062; Hawaii: **Tavares v. Tavares,** 574 P.2d 125, 127 (1978) (reopen for inquiry re vesting); Kentucky: **Foster v. Foster,** 589 S.W.2d 223, 224 (Ky.App. 1979); Minnesota: **Elliott v. Elliott, supra;** Tennessee: New Mexico held in **Stephens v. Stephens,** 93 N.M. 1, 595 P.2d 1196 (1979) that the law of Tennessee as well as of New Mexico required division of military retirement in divorce cases.

10. M.P. Gross, **The Officer's Family Social Guide,** Beau Lac Pub. 1977, Library of Congress Catalog Card No. 77-72724; Testimony before the House Armed Services Subcommittee on Military Compensation by Rep. Patricia Schroeder May 28, 1980, p.2, citing Nancy Shea **The Air Force Wife,** New York, Harper and Bros. 1951, n.p.

11. See Appendix "A".

12. Jean Reid, "Divorced Air Force Wives Want Benefits for Dedication of Work" **Valley Times** (North Las Vegas, Nevada), November 12, 1980, p.l.

13. Reid, **op.cit.;** See also, Bruce Callander "Commentary", **Air Force Times,** July 7, 1980, n.p.: "Many (military) wives contribute directly to the success of their husbands by encouraging them by wise counseling, by entertaining their associates, by maintaining tranquility in the home and being supportive in other ways."

14. "A company grade officer's family must be able to meld successfully into an already established way of life . . . When they arrive at a base or post, the other members of the command will extend to them all of the courtesies and priviliges that are given to military families . . . The chief of security will be as interested in their security as that of the senior family . . . the engineers will be as interested in the maintenance of their quarters . . . the commander as

interested in their well-being. A wise couple will show their appreciation and reciprocate by making a real effort to cooperate and be a part of the community . . . It will certainly be more advantageous [to the officer returning to civilian life] if his record reflects a couple who were sincere in their efforts, who could meet and enjoy new people, who were able to adapt to new and different circumstances, and who displayed an attitude of cooperation and respect . . . Many think that the field grade officer [colonel] and his wife are the most vital link in the military life chain." Gross, **The Officer's Family Social Guide,** supra, p. 3; "Family Life Vital to Military Readiness", **Air Force Times,** p.1, Nov. 10, 1980; describing conferences on issue and study by Dr. Dennis K. Orthner, "Families in Blue: A Study of Family Life in the Air Force".

15. Testimony before Armed Service, etc. by Action for Former Military Wives, n.9.

16. These national organizations include Action for Former Military Wives, Ex-Partners of Servicemen for Equality, Alliance for Unknown Women Veterans, Medical Equality for Dependents. Diane Reischel, "Former Military Wives want their Cut of the Retirement Pay" Fort Worth **Star-Telegram,** Fort Worth, Texas, August 11, 1980, Living Section C; Nancy Senalle, "Military Wives (We also served)" **Virginia Weekly,** December 4, 1980, reprint from **Washington Post,** no date.

17. U.S. Dept. of Commerce, Bureau of Census, Current Population Study, Child Support & Alimony, p. 23, No. 107, Sept. 1980. Cassetty, Child Support and Public Policy, Lexington Books, Lexington, Mass.

18. Chambers, David: Making Fathers Pay; The Enforcement of Child Support: Chicago; University of Chicago Press, 1979, note, especially, pp. 48-49.

19. 42 USCA §410(a), (m) and 20 CFR §404.1013(f).

20. 42 USCA §413(a)(1) and 20 CFR §404.102.

21. **Matthews v. DeCastro,** 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). The Court held that the statutory classification of §202(b)(1) of the Social Security Act whereby a married woman under 62 whose husband retires is granted monthly benefits if she has a minor or dependent child in her care, but a divorced woman under 62 whose ex-husband retires does not receive such benefits (until she reaches 62) does not violate the Due Process Clause of the Fifth Amendment.

22. **Ibid,** fn. 19.

23. Report, Social Security and the Changing Role of Men and Women, HEW, p.10, 2-29; see Department of Labor, Bureau of Labor Statistics 2B, Employment and Earnings 28 #6, June, 1978; See also President's Commission on Pension Policy: Working Women, Marriage and Retirement, Working Papers, August 1980, pp.29-49.

APPENDIX "A"

CERTIFICATE OF APPRECIATION

FROM THE UNITED STATES AIR FORCE

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

THIS IS TO CERTIFY THAT

MRS JAMES K. POTTS

on the occasion of the retirement of her husband from active duty with the

UNITED STATES AIR FORCE

has earned grateful appreciation for her own unselfish, faithful and devoted service. Her unfailing support and understanding helped to make possible her husband's lasting contribution to the Nation

ON THE 1ST DAY OF JANUARY
ONE THOUSAND NINE HUNDRED AND SEVENTY SEVEN

George H. Sylvester

GEORGE H. SYLVESTER
Lieutenant General, USAF
Commander, Aeronautical Systems Div.

David C. Jones

CHIEF OF STAFF

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On January 3, 1981, I served the within Motion and Brief of the Amicus Curiae on the interested parties in said action, by placing a true copy in each of five (5) sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Mattaniah Eytan
Kirkwood, Kaplan, Russin & Vecci
332 Pine St., Suite 400
San Francisco, CA 94104
(For appellant husband)

Herbert N. Harmon, Atty.
Harmon, Wilmot & Spaulding
910 17th St., N.W. Ste. 612
Washington, D.C. 20006
(For amicus men's military groups)

Walter T. Winter, Esq.
100 Bush St., 20th Floor
San Francisco, CA 94101
(for appellee)

Clerk Court of Appeal
1st Appellate District
4154 State Bldg.
Civic Center
San Francisco, CA 94101

Clerk of Superior Court
County of San Francisco
480 City Hall
San Francisco, CA 94102

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 3, 1981, at Santa Ana, Califoirnia.

Jack Gallagher

No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN MCCARTY, *APPELLANT*

v.

PATRICIA ANN MCCARTY, *APPELLEE*

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

Motion of The Non-Commissioned Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of The United States, The National Association for Uniformed Services and The Marine Corps League For Leave To File Brief As *Amici Curiae* and *Amici Curiae* Brief.

HERBERT N. HARMON, *ATTORNEY*
HARMON, WILMOT & SPAULDING
910 17th Street, N.W., Suite 612
Washington, D.C. 20006
Telephone: (202) 466-5330

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No. 80-5

In the Supreme Court

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RICHARD JOHN MCCARTY, *APPELLANT*

v.

PATRICIA ANN MCCARTY, *APPELLEE*

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Motion of The Non-Commissioned Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association for The United States, The National Association of Uniformed Services and The Marine Corps League For Leave To File Brief As *Amici Curiae.*

The Non-Commissioned Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of The United States, The National Association for Uniformed Services, and The Marine Corps League respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae.*

The consent of the attorney for the appellant herein has been obtained, but the attorney for the appellee herein refused to consent to the filing of a brief by the above listed associations as *amici curiae.*

The applicants have an interest in this case in that the purpose of each association is to serve the national interest and the members of the armed forces. The question in this case directly affects all members of the armed forces and the national interest in that a failure to reverse the California court will potentially alter the pay of every member of the armed forces of the United States. In its impact on the pay of the armed forces, the resolution of the question herein will affect the individual members, the national defense, and the security of the Constitution of the United States.

The brief of the appellant herein argues that the decision of the California court has deprived him of a protected interest, but he has not fully argued the impact of the question herein as it relates to the national interest. The accompanying brief attempts

to expand the arguments which relate to the question herein on the basis of the national interest and members of the armed forces generally.

The applicants believe that the decisions of the courts below should be reversed.

HERBERT N. HARMON,
Counsel for the Non-Commissioned Officers Association of the United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of the United States, The National Association for Uniformed Services and the Marine Corps League.

HARMON, WILMOT & SPAULDING, P.C.
910 17th Street, N.W., Suite 612
Washington, D.C. 20006
Telephone: (202) 466-5330

AMICI CURIAE BRIEF

By leave of Court, the following brief is submitted.

QUESTION PRESENTED

Whether the United States military retired pay may be considered "property" having present value, and as such, be divided by the states as community property, or that the pay must be considered "pay", earned at the time it is received, for purposes of state domestic relations law.

SUMMARY OF ARGUMENT

Military retired pay is an important, integral, and costly part of the national defense. The supremacy doctrine requires that the legislative purpose and functional integrity of the pay system not be damaged by individual sovereign states' notions of domestic relations equity.

THE INTERESTS OF THE AMICI

The more than 972,000 memberships represented by the The Non-Commission Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of the United States, The National Association for Uniformed Services and The Marine Corps League present the arguments herein because the decision of this Court affects the individual members and the defense of the

United States. It is the purpose of each association to serve the individual members and for the memberships, to strengthen the defense of the Constitution and the nation.

1. THE NON-COMMISSIONED OFFICERS ASSOCIATION OF THE USA

The Non-Commissioned Officers Association of the USA (NCOA) is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960. NCOA currently has more than 211,000 members, each of whom has served or is serving as a non-commissioned or petty officer in a regular or reserve component of the Army, Marine Corps, Navy, Air Force, Coast Guard or National Guard of the United States. Approximately 83 percent of the membership is on active duty with the remaining portion distributed among military retirees and honorably discharged veterans.

2. THE RETIRED OFFICERS ASSOCIATION

The Retired Officers Association (TROA) is a nonprofit, membership organization incorporated under the laws of the District of Columbia with headquarters in Alexandria, Virginia. TROA was founded in 1929, and has at the present time approximately 284,000 members. Membership in TROA is open to all men and women who are, or have been, commissioned or warrant officers in the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, or the National Oceanic and Atmospheric Administration,

including the reserve and other components of these services. Widows and widowers of deceased members, or of any individuals who would have been eligible for membership, also qualify as auxiliary members. Among the purposes of TROA, as stated in its Bylaws, are "to aid active and retired personnel of the various services from which our members are drawn, and their dependents and survivors, in every proper and legitimate manner" and "to present their rights and interests when service matters are under consideration."

3. THE AIR FORCE SERGEANTS' ASSOCIATION

The Air Force Sergeants' Association currently has 150,230 members composed of enlisted or former enlisted members of the Air Force, the Air Force Reserve, the Air National Guard and retired members of those components. The members belong to 198 chapters througout the world.

4. THE FLEET RESERVE ASSOCIATION

The Fleet Reserve Association consists of 147,330 members who are enlisted personnel of the Sea Services (Navy, Coast Guard and Marine Corps) in active, reserve, disabled, or retired status. Membership is also extended to officers who have performed active-duty enlisted service. The Association is chartered under the laws of Pennsylvania.

5. THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

The Reserve Officers Association of the United States (ROA) was organized in 1922, and chartered by Congress in June 1950. Originally, ROA consisted solely of Army Officers, Reserve, National Guard, and Retired.

Following World War II, ROA expanded its membership to all Services and it now has a membership of approximately 127,000. This number includes 66,000 Army Officers, 40,000 Air Force Officers, 12,000 Naval Officers. The balance are Coast Guard, Marine Corps, and Public Health Officers. There are also about 3,000 members who are ROTC cadets and midshipmen. The Organization has approximately 650 chapters throughout the United States and overseas, and it is very active regarding national defense issues.

6. THE NATIONAL ASSOCIATION OF UNIFORMED SERVICES

The National Association for Uniformed Services (NAUS) currently has 26,000 members, of all ranks. NAUS was founded in 1968 as an association for active reserve and retired members and veterans of the seven uniformed services of the United States. The purpose of NAUS is to support legislation and policies which maintain and improve the defense of the United States and which make service careers attractive.

7. THE MARINE CORPS LEAGUE

The Marine Corps League is a Congressionally Chartered military and veterans organization comprised of active duty, reserve, retired, and other former members of the Marine Corps. Its charter was granted by the 75th Congress of the United States and was approved on August 4, 1937. The League currently has approximately 25,000 members who are affiliated with more than 400 community based detachments throughout the United States. Its purposes are to preserve the traditions and promote the interests of the United States Marine Corps, and to support policies which strengthen the national defense.

STATEMENT

The *amici* join in the arguments and discussion of appellant as to military retired pay not being "property" subject to division in state domestic relations court. We wish to add emphasis to the policy considerations with respect to national defense which we feel dictate the same result.

DISCUSSION

I

THE PURPOSE OF MILITARY RETIRED PAY IS THE NATIONAL DEFENSE.

The fundamental purpose of retired pay of military personnel is to provide for the national defense. It is this fundamental

purpose which requires the finding that there is a federal interest to protect in the case before the Court, that the federal interest preempts state law, and that the federal interest dictates a finding that retired pay is not a vested property right. The findings by scattered state courts,[1] that retired pay is a vested property right, based upon certain characteristics of the payment, pose significant threats to the special nature of this "entitlement" and its function in national defense.

A

To accomplish this purpose, the retired pay system has three goals: to increase morale, to provide a programmed career pattern which encourages trained youth to serve, and to provide stability for members of the armed forces.

To provide for the national defense, Congress has provided the incentive of retired pay to military personnel. It is a costly program with three direct goals. By indicating direct and substantial support of the nation, retired pay increases the morale of military personnel who choose to make the military a career. By being restricted to payment only to those who serve for twenty years, it is an inducement to continue service. It is an equally significant aspect of the system that it is designed to encourage transfer to retired status after twenty years to keep the active-duty ranks young. The retired pay system thus tends to

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[1]Some State courts have approved lump sum valuation of military retired pay which establishes a very large present value for future pay.This creates a credit which effectively strips most military members of all other assets at the close of the domestic proceedings. See, e.g. *Ramsey v Ramsey* 96 Idaho 672, 535 P2d 53 (1975); *Payne v Payne* 82 Wash 2d 573 512 P2d 736 (1973).

provide a program for service career patterns. By being relatively stable, the retired pay system affords compensation for opportunities missed and assurance that the risk of service will be followed by an adequate future.

B

The goals of the retired pay system relate to the choices of the service member, not others.

The three goals are directly related to the armed forces members. It is his or her morale that is necessary to defense. It is his or her decision to remain in the military that counts. It is his or her future that is secured.

C

Congressional action demonstrates an intent to confer the benefits of retired pay on the service member, not others.

Congressional action as to retired pay repeatedly confirms the intent that it is the military member who is the beneficiary and controls the payment. The Survivor Benefit Plan (10 U.S.C. Sec. 1447-1455) allows the retired member to designate a benefit for a spouse; it is the member's choice. If divorce occurs; *by statute,* the benefit cannot be paid to the former spouse. This legislative scheme alone suggests sufficient federal limitation of retirement benefits to the armed forces member personally to establish preemption.

The retired pay plan includes specific assignment, garnishment, levy and execution limitations as well as other

limitations intended to assure the retired member the personal benefit of the plan. In the special case of child and spousal support, specific legislative provisions provide for enforcement of payment. Social Security Act 42 U.S.C. (Supp II) 659. Again, preemption is suggested by the statutory scheme and the failure to go further in allowing access to retired pay. In fact, the Act specifically does not grant access for domestic relation orders or settlements treating retired pay as property.

> "Alimony . . . (does) not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable division of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp II) 662(c)

To the extent it has the constitutional power to do so, the Congress has attempted to protect retired pay from being defined as property and divided.

Certainly it is apparent that the Congress is aware of the significance of the difference between the terms "pay" and "property" as they influence domestic relations law. In enacting the Dual Compensation Act, 5 U.S.C. Sec. 5532, the military retired pay is without exception, referred to as "pay".

D

The relationship of retired pay to national defense suggests that retired pay is an inducement to fight, and if need be, die for the national good.

The relationship of retired pay to national defense suggests that the compact made is between the United States and the potential combatant, and no one else. This relationship is intentional and has a purpose.

The military, like firefighting and law enforcement, is a profession with inherent risk. In peace, it is a risk of potential conflict. In time of war, the conflict is actual. Combat involves risks different from any profession. At times, sacrifices of companies, squadrons and ships for tactical or strategic advantage are necessary. These are the risks for which compensation is paid. The compensation is paid to the combatant.

E

The risk continues after retired status accures.

The history of military compensation supports the conclusion that retirement-subject-to-recall is a sound national defense policy. Relative peace is what allows the military retired pay to be viewed as a simple annuity by some state domestic relations judges. The retired military has not been put to the ultimate test of a true national emergency in recent years.[2] Were they called back, the absurdity of viewing the retired pay as a vested property right would be apparent. Would remarried former

spouses have a claim on half the service member's active duty pay or would they settle for one-half the former retired pay? At this time in history military compensation is more than ever a part of national defense.

F

At this time in history, military compensation is, more than ever, a part of national defense policy.

The Congress, in providing for military compensation, provides directly for national defense with its decision on expenditures. The military retired pay system required $10 billion dollars in 1979. Military compensation is a significant factor in the success or failure of the all-volunteer armed forces. The ultimate end of the volunteer force may be an open question, but it has an integral function in the defense structure of the United States. Now more than ever, there is a clear federal purpose in all military compensation which should not be frustrated by local action.

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[2]Voluntary return by retired military to active duty in time of war has occured in every conflict since the inception of the system, including the Korean conflict and the Vietnam War. The last mandatory return to active duty was a Presidential Executive Order of September 8, 1939. A current shortage of Army Reserve strength has led to a two year project to organize a mandatory recall of retirees in case of a national requirement. "Test Program Begins for Recall to Active Duty", *Army Echoes,* U.S. Army Finance and Accounting Center, Dept. 90, Indianapolis, Indiana, May/June 1980 at p.1.

II

LOCAL AND STATE PROPERTY LAW FRUSTRATES THE NATIONAL DEFENSE AS IT AFFECTS RETIRED PAY

A

Retiring military personnel must carefully consider which jurisdictions are threats to retired pay.

Local or state action affecting armed forces retirees' pay takes several forms and has distinct consequences which hamper the policy of Congress. Under the current law in states attempting to interpret *Hisquierdo v. Hisquerdo* 439 U.S. 572 (1979), a retiring member of the armed forces must make a decision with respect to the serious differences in property law between states, and the resulting differences in the vulnerability of his or her retirement pay. *Henn v. Henn,* 602 P2d 10, 161 Cal Rptr 502 (1980); *Cose v. Cose.* In the U.S. Supreme Court on Petition for Writ of Certiorari to the Supreme Court of Alaska No. 79-1469. The differences in the law relate to a federal entitlement which should be secure in all states. The differences unfairly hamper a retiree's choice of domicile, but more importantly, diminish the value of retired pay.

A more insidious result occurs where military members, not yet retired, are compelled to enter jurisdictions hostile to their interests. This compulsion is part of military service and discipline, it should not result in damage to the service members' interests. Where a state court awards **future** retired pay, prior to retirement, the extreme is approached. Where a state court

establishes a lump sum value to **future** retirement pay prior to retirement, and awards properly based on that figure, the extreme is reached.[3]

B

"Forum shopping" by spouses, at government expense, is encouraged to maximize their divorce or dissolution rights.

Differing state results in divorce or dissolution actions encourage spouses to seek jurisdictions which will give them the best advantage. Orders overseas afford dependents (spouses) an opportunity to select any jurisdiction and travel there at government expense. The consequences of forum selection can be extremely profitable. It is unfair to subject service members to this "forum shopping" threat and, more importantly here, it is a denigration of the retired pay benefit to the member.

C

The differing state laws produce confusion and undermine the military members' conception of a stable benefit.

The myriad forms of court orders which are directed to armed forces finance centers illustrate the current confusion of state law

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[3]The impact of this extreme situation can be seen in considering, as an example, a military member with 12 years service, joint property (a house) with equity valued at $50,000; who is awarded custody of children, and the house for the benefit of the children not being moved. If the lump sum value of the retired pay is set at $50,000 and awarded to the spouse, there is no longer any incentive to attain retired status, or at best, the accrued value of obtaining that status is reduced by half.

with respect to retired pay. The confusion demonstrated by that report is significant in that the nature of appropriate garnishment of retired pay is unclear to the service member. Many of the armed forces finance centers will comply with state orders which are valid on their face. This practice (which appears appropriate given the lack of definitive direction from the federal courts) places the service member under potential *de facto* jurisdiction of every one of the fifty states in which a spouse might seek such an order.

D

Sovereign states cannot appropriately balance national interests with state interests—nor should they be expected to do so.

It is not our contention that the states have ordered property division in divorce or dissolution actions with an inimical purpose. States which have established community property law are presumed to have done so with a logical basis. Each sovereign state which has ordered payment of retired pay as a division of property without being a community property state is presumed to do so with a logical basis. But as each state weighs its decision the national defense is not a necessary factor. This failure of consideration creates the basis for the preemption doctrine. It is the basis for the *Hisquierdo* ruling and should be the basis for the decision here.

E

The States' intrusions on military benefits violate the compact between the military member and the federal government, and threaten to do so in an *ex post facto* manner.

Another illustration of the inimical effects of state determination of the federal military retired pay policy is the impact of the determination as an infringement of basic contract principle. This impact has two facets. First, and most clearly, the state decisions, assuming *in personam* jurisdiction of both parties to the divorce, are an *ex post facto* alteration of the retired members "contract" with the United States. As a member of the armed forces, a potential combatant anticipates the Congress may alter the retired pay system. He or she enters the service of the United States with the assurance that the United States controls the retired pay entitlement during the entire period of service. The compact does not include the sovereign states during this period. At no time during the career of the military member is any individual sovereign state a party to the decision to continue in the service of the United States, nor should it be. In the case of a service member retiring from an extended absence from a state jurisdiction to find his or her retirement entitlement and obligations altered, all of the considerations which militate against legislative or judicial *ex post facto* decisions are present.

The second facet is related to the first. The states are not a party to the contract. The contract contains bilateral promises. The member is sworn to protect the Constitution of the United States against all enemies, foreign and domestic. The United States grants the service member the benefits of the retired pay

system as a nation[4]. To allow the states to infringe upon the relationship between the armed forces and the United States is a direct violation of the supremacy doctrine.

III

THE *AMICI* ARE NOT OPPOSED TO EQUITABLE ENFORCEMENT OF CHILD SUPPORT, SPOUSAL SUPPORT AND PROPERTY DIVISION BY THE STATES.

The *amici* support the retained power of a state to provide financial support for its citizens. They are in agreement that the power of a state to require support from any of its citizens is a parochial matter subject only to the due process test of a rational basis for any law. Our concern is the application of local concepts of equity in domestic relations law without consideration for, and ultimately at the expense of, our national defense.

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[4]The full consequence and nature of the oath to the Constitution was tested during the American Civil War, and is observable where federal forces act within the states and affect domestic issues.

CONCLUSION

For the foregoing reasons the appeal should be granted and the court below reversed.

Dated December 4, 1980

Respectfully submitted,

HARMON, WILMOT & SPAULDING
910 17th Street, N.W. Suite 612
Washington, D.C. 20006
Telephone (202) 466-5330

by
HERBERT N. HARMON
Attorney for *amici*

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the Motion for Leave to File an *Amici Curiae* Brief and the accompanying brief to Mr. Walter Winter, Attorney for Appellee and to the attorneys for the appellant.

Executed on December_____, 1980.

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